Supreme Court, U.S.
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No. 91-1943

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

BRUNNER & LAY, INC., ROBERT M. WILKINSON, AND BOBBY AND GEORGIA MCLAUGHLIN, on behalf of themselves and all other similarly situated taxpayers,

Petitioners,

v.

JIM C. PLEDGER, COMMISSIONER OF REVENUES; JIMMIE LOU FISHER, TREASURER OF THE STATE OF ARKANSAS; JOAN R. PERRY, TREASURER OF WASHINGTON COUNTY; AND CHARLES A. JOHNSON, COUNTY JUDGE OF WASHINGTON COUNTY, ARKANSAS

Respondents.

Petition for a Writ Of Certiorari to the Supreme Court of Arkansas

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does Arkansas' sales and use tax scheme discriminate on its face against interstate commerce by taxing used property that has previously been taxed by other states while exempting used property that has previously been taxed by Arkansas?

2. Does Arkansas' sales and use tax scheme discriminate in practical effect against interstate commerce by taxing most out-of-state purchases of used cars, airplanes, and mobile homes for use in Arkansas while exempting most in-state purchases of such items?

RULE 29.1 STATEMENT

Brunner & Lay, Inc. has two corporate stockholders which collectively own 83.35 percent of all the issued and outstanding stock in Brunner & Lay, Inc. as follows:

BRUNNER & LAY INTERNATIONAL LTD	50.50%
BRUNNER CAYMAN LTD	32.85%

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IN THE SUPREME COURT OF THE UNITED STATES
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BRUNNER & LAY, INC., ROBERT M. WILKINSON,
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JUDGE OF WASHINGTON COUNTY, ARKANSAS

Respondents.

**Petition for a Writ of Certiorari to the
Supreme Court of Arkansas**

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request this Court to issue a writ of certiorari to review the judgment of the Supreme Court of Arkansas or, in the alternative, to reverse summarily the Arkansas court's judgment.

OPINIONS BELOW

The opinion of the Supreme Court of Arkansas (App. A 1a-17a) is reported at 308 Ark. 512, 825 S.W.2d 599. The opinion of the Chancery Court of Pulaski County, Arkansas, First Division (App. B 18a-34a) is unreported.

JURISDICTION

The judgment of the Supreme Court of Arkansas was entered on March 2, 1992. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the Constitution of the United States, art. I, § 8, cl. 3, provides: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

Relevant portions of the Arkansas Code are set forth at App. C 35a-39a.

STATEMENT

1. *Arkansas' Sales and Use Tax Scheme*

Arkansas imposes a sales and use tax on tangible personal property sold or used in the state. Ark. Code Ann. §§ 26-52-101 *et seq.*, 26-53-101 *et seq.* (1987).[1] In most respects, Arkansas'

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[1] Although some of the transactions at issue here were technically governed by an earlier codification of the Arkansas statutes, the pertinent statutory language was not changed in the 1987 codification. For ease of reference, and in accord with the practice of the courts below, all statutory references will be to the Arkansas Code of 1987 Annotated.

sales and use tax scheme follows the familiar pattern approved by this Court in *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937) "to make all tangible property used or consumed in the State subject to a uniform tax burden irrespective of whether it is acquired within the State, making it subject to the sales tax, or from without the State, making it subject to a use tax at the same rate." *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 66 (1963).

Arkansas thus imposes a four percent sales tax on sales of tangible personal property in the state, Ark. Code Ann. §§ 26-52-301, 26-52-302 (1987) (App. C 35a), and a complementary four percent use tax on purchases of tangible personal property for use or consumption in the state. Ark. Code Ann. §§ 26-53-106, 26-53-107 (1987) (App. C 37a). The use tax applies only to transactions which are not subject to Arkansas' sales tax, Ark. Code Ann. § 26-53-112 (1987) (App. C 37a-38a), namely, out-of-state purchases. Arkansas provides a credit against its use tax for sales or use taxes that the purchaser has paid to other states, Ark. Code Ann. § 26-5-101(V) (1987) (App. C 35a), thus eliminating the possibility that a single transaction would be subjected to multiple taxation by two states.

The controversy in this case arises out of Arkansas' departure from the general sales and use tax principle that all sales and purchases of tangible property used or consumed in the state should be subject to a uniform tax burden regardless of where the property was previously sold or used. Arkansas' sales and use taxes are not uniformly applied when used cars, mobile homes, or airplanes are sold or used in Arkansas. Instead, Arkansas' sales and use taxes are applied to the sale or use of used cars, mobile homes, or airplanes if, but only if, no *Arkansas* sales or use tax was applied to a previous transaction involving the same property. Ark. Code Ann. §§ 26-52-504, 26-52-505, 26-52-510, 26-53-112, 26-53-126 (1987) (App. C 36a-39a). By contrast, transactions involving used cars, mobile homes, or airplanes are exempt from Arkansas' sales and use tax if Arkansas' sales or use tax was applied to a prior in-state sale

or use of the property.[2] Rather than imposing a uniform tax burden on all transactions involving used cars, mobile homes, and airplanes regardless of where such property was previously sold or used, Arkansas makes the tax burden turn on whether the property was previously sold or used in Arkansas.

2. *The Transactions at Issue Here*

Petitioner Brunner & Lay, Inc. is a Delaware corporation which has a manufacturing and sales facility located in Springdale (Washington County), Arkansas. In 1984, Brunner & Lay, Inc. purchased a used airplane in Massachusetts for $825,000. The seller of the airplane had previously paid a five percent use tax of $57,500 to Massachusetts when it purchased the airplane new for $1,150,000. The Arkansas Department of Finance and Administration issued a proposed assessment of Arkansas' four percent use tax of $33,000 and a one percent Washington County use tax ($25.00 maximum) against Brunner & Lay for storage and use of the airplane in Arkansas.[3] No tax would have been due if an Arkansas sales or use tax had been imposed with respect to the previous sale or use of the airplane. App. A 3a.

Petitioner Robert M. Wilkinson is a resident of Brickeys (Lee County), Arkansas. In 1985, Wilkinson purchased a used car in Memphis, Tennessee for $12,588. The original purchaser of the car had previously paid a five percent sales tax to Tennessee when he

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[2]In the case of used cars and mobile homes, prior registration in Arkansas serves as evidence that Arkansas sales or use tax was applied to a previous transaction involving the property item. Ark. Code Ann. §§ 26-52-510(b)(2), 26-53-126 (1987) (App. C 36a-38a) (App. A 7a). The statutory equation of prior Arkansas registration with previous exposure to Arkansas sales and use tax reflects the actual payment of or credit for Arkansas sales or use taxes in the overwhelming majority of cases. The statutory rule deeming prior registration as evidence that the car or mobile home has previously been subjected to Arkansas sales or use tax nevertheless applies whether or not an Arkansas sales or use tax has in fact been imposed with respect to a prior sale or purchase of the item. App. la-2a.

[3]Ark. Code Ann. §§ 26-74-201 *et seq.* (1987) authorizes one percent county sales and use taxes, with a $25 maximum on each transaction.

purchased the car in Tennessee. When Wilkinson registered the car in Arkansas, he was required to pay Arkansas' four percent use tax of $503.52 and Lee County's one percent use tax ($25 maximum). No tax would have been due if an Arkansas sales or use tax had been imposed with respect to the previous sale or use of the car. App. A 4a-5a.

Petitioners Bobby and Georgia McLaughlin are residents of Nashville, Arkansas. In 1984, the McLaughlins purchased a used mobile home in Oklahoma for $1,000. When the McLaughlins registered the mobile home in Arkansas, they were required to pay Arkansas' four percent use tax of $40. No tax would have been due if an Arkansas sales or use tax had been imposed with respect to the previous sale or use of the mobile home. App. A 5a.

3. *The Proceedings Below*

Brunner & Lay, Inc. objected to the proposed assessment of Arkansas' use tax[4] and has not paid the tax; Wilkinson filed a claim for refund of the Arkansas use tax he paid, but the claim was denied; the McLaughlins filed no administrative claim for refund.

In September 1986, Brunner & Lay, Inc. and Wilkinson filed a class action on behalf of themselves and all other similarly situated taxpayers challenging the constitutionality of imposing Arkansas' sales and use taxes only upon transactions involving used cars, airplanes, and mobile homes not previously subjected to Arkansas' sales or use tax.[5] The complaint invoked the Commerce Clause as a predicate for the constitutional challenge.[6]

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[4]This and all subsequent references to "Arkansas" sales and use taxes include any applicable county sales or use taxes.

[5]The McLaughlins were added as co-plaintiffs and class representatives on the day of trial.

[6]Petitioners also challenged Arkansas' sales and use tax scheme under the Equal Protection Clause, a challenge that was sustained by the trial court but rejected by the Arkansas Supreme Court. Even though petitioners disagree with the holding of the Arkansas Supreme Court on this issue, they are not pressing their equal protection claims in this Court. Therefore, no further reference will be made to the equal protection issue.

The trial court found that Arkansas' preferential treatment of transactions involving used property that had previously been subject to tax in Arkansas discriminated against interstate commerce in violation of the Commerce Clause. Relying heavily on this Court's decision in *Halliburton*, which struck down as unconstitutionally discriminatory a taxing scheme that favored local over out-of-state purchases of used property, the court concluded that Arkansas had effected the same forbidden result "by conditioning the applicability of the exemptions for used airplanes, motor vehicles and mobile homes upon the distinction of whether Arkansas taxed a prior transaction involving a particular property item." App. B 25a. The vice of such a taxing regime, the court further observed, was that it "forecloses tax neutral decision making" (App. B 26a) by inducing consumers to purchase used cars, mobile homes, and airplanes based on their prior connection with Arkansas rather than on factors unrelated to state lines.[7]

The Supreme Court of Arkansas reversed. It identified the "principal object of the Arkansas sales and use tax scheme" as taxing "only *one* sale or purchase of a particular airplane, motor vehicle, or mobile home." App. A 15a (emphasis in original). The court "emphasized that the exemption did *not* depend on the residency of either the seller or the buyer, or on the location, in or out of this State, of the sale or purchase transaction." *Id.* (emphasis in original). Thus "[a] purchase out of state of an airplane, motor vehicle, or mobile home for use in Arkansas would qualify for the exemption if the particular item had been subjected to an Arkansas sales or use tax with respect to a prior sale . . . ." *Id.* at 15a-16a. "In this sense," the court concluded, "Arkansas' exemption scheme did insure 'equal treatment for in-state and out-of-state taxpayers

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[7]Following the trial court's decision, the Arkansas legislature amended the statutes to eliminate the discriminatory exemptions. 1991 Ark. Acts, No. 3, § 5. Exemptions similar to those at issue here, however, remain in effect in other states. See pp. 17-19 *infra*.

similarly situated.'" *Id.* at 16a (quoting *Halliburton*, 373 U.S. at 70). The court said nothing, however, about the practical impact that such a scheme has on a consumer's decision to make an in-state or out-of-state purchase in light of the fact that, unlike used property sold in Arkansas, similar property purchased outside of Arkansas will rarely have been subjected to a previous Arkansas sales or use tax.

The Arkansas Supreme Court found additional support for the constitutionality of Arkansas' sales and use tax scheme in the possibility that Arkansas could have imposed a use tax on out-of-state purchases without providing a credit for sales taxes paid to other states. The court observed that this Court "'has expressly reserved the question whether a State must credit a sales tax paid to another State against its own use tax.'" App. A 16a (quoting *Williams v. Vermont*, 472 U.S. 14, 21-22 (1985)). Speculating that this Court would in fact hold that the grant of such a credit was not constitutionally required, the court declared:

> Surely, the Arkansas sales and use tax exemption scheme, that essentially required that an Arkansas sales or use tax be imposed with respect to <u>one</u> sale or purchase transaction only, and allowed a credit against the use tax for any out-of-state sales tax imposed on the same purchase, imposed much less of a burden than would a perhaps permissible use tax with no credit available for an out-of-state sales tax.

Id. at 16a-17a (emphasis in original). Aside from its assumption that the Arkansas exemption scheme would constitute a "lesser included offense" to a use tax with no credit for an out-of-state sales tax, the court did not explain how the increased tax burden on transactions involving property having no previous connection with Arkansas could pass muster under the Commerce Clause.

REASONS FOR GRANTING THE WRIT

No value is more central to our constitutional regime than national economic unity. The Framers articulated this value in the Commerce Clause by conferring the power to regulate interstate commerce upon Congress and not upon the states, whose discriminatory trade policies under the Articles of Confederation had seriously disrupted interstate commerce. *See Michelin Tire Corp. v. Wages*, 423 U.S. 276, 283-86 (1976). This Court has likewise recognized that "[t]he very purpose of the Commerce Clause was to create an area of free trade among the several States." *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944). The Court has faithfully protected the core Commerce Clause value of free trade within a national market in its numerous decisions striking down state laws that discriminate against interstate commerce. And, for the past two centuries, our nation has prospered under the guiding principle that state lines are fundamentally irrelevant to the conduct of economic activity.

Arkansas' taxing scheme amounts to a frontal assault on these bedrock Commerce Clause concerns. By according preferential tax treatment to transactions involving used property that has a previous connection with the state, and, in practical effect, to in-state over out-of-state purchases of used property, Arkansas has violated the most basic teaching of this Court's Commerce Clause cases---that states may not favor local over out-of-state activities. Moreover, Arkansas' discriminatory taxing scheme has in substance been replicated in many other states. If the decision below were left undisturbed, it would not only provide unwarranted support for these discriminatory taxes, it would send the wrong message to state legislatures which, without this Court's vigilant oversight, are likely to succumb to the "centrifugal forces of localism." Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 Yale L.J. 219, 222 (1957).

Because the decision below is in direct conflict with the decisions of this Court and has ramifications of great national significance, this Court should grant this petition to ensure that the

Commerce Clause continues to serve its intended function.

I. THE DECISION BELOW UPHOLDING ARKANSAS' DISCRIMINATORY TAXING SCHEME CONFLICTS WITH THIS COURT'S PRECEDENTS ON A QUESTION OF CRITICAL IMPORTANCE TO COMMERCE CLAUSE JURISPRUDENCE

The Arkansas Supreme Court's decision upholding a tax that discriminates on its face and in practical effect against interstate commerce in used cars, mobile homes, and airplanes is wholly incompatible with this Court's precedents invalidating discriminatory state taxing schemes.

A. Facial Discrimination

State laws that discriminate on their face against interstate commerce almost always offend the Commerce Clause. Indeed, this Court has characterized the Clause as erecting "a virtual[] *per se* rule of invalidity" with respect to such statutes. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Aside from the few cases in which this Court has upheld a facially discriminatory tax on the ground that it compensates for a tax applicable solely to intrastate commerce, and therefore is not in substance discriminatory, *see, e.g., Henneford*, we are not aware of any case in which the Court has upheld a tax that discriminates on its face against interstate commerce. Rather, such statutes are routinely invalidated. *See, e.g., New Energy Co. of Ind. v. Limbach*, 486 U.S. 269 (1988) (fuel sales tax credit limited to products of certain states); *Tyler Pipe Indus., Inc. v. Washington State Dep't of Rev.*, 483 U.S. 232 (1987) (manufacturing tax exemption limited to in-state wholesalers); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) (liquor excise tax exemption limited to in-state products); *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984) (wholesaling tax exemption limited to in-state manufacturers); *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984) (income tax credit limited to corporations engaged in in-state export activity); *Maryland v. Louisiana*, 451 U.S. 725 (1981)

(use tax credit limited to in-state activities); *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977) (favorable stock transfer tax rates limited to transactions effected through in-state brokers); *I.M. Darnell & Son v. City of Memphis*, 208 U.S. 113 (1908) (property tax exemption limited to in-state products); *Walling v. Michigan*, 116 U.S. 446 (1886) (liquor license tax limited to out-of-state vendors of out-of-state beverages); *Guy v. City of Baltimore*, 100 U.S. 434 (1880) (wharfage charge limited to vessels carrying goods from other states); *Welton v. Missouri*, 91 U.S. 275 (1876) (license tax limited to vendors of out-of-state products).

By according preferential tax treatment to transactions involving property previously taxed by Arkansas, Arkansas' taxing scheme violates the Commerce Clause rule against facially discriminatory taxes. Arkansas exempts the sale or use of a used car, airplane, or mobile home from tax if, but only if, *Arkansas* has taxed an earlier sale or use of the property. Since Arkansas would not have taxed an earlier sale or use of the property unless the property was sold or used in Arkansas, a prior connection with Arkansas is therefore the sole determinant upon which the taxability of sales and purchases of such used property depends. A consumer faced with the choice of purchasing a used car, airplane, or mobile home will, all other things being equal, invariably choose the used property with the Arkansas lineage to avoid paying the Arkansas sales or use tax. The "inexorable hydraulic pressure" (*American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 286 (1987)) for purchasers to favor Arkansas-connected used property over used property without local connections is self-evident. So is the conclusion that the taxing scheme "forecloses tax-neutral decisions" (*Boston Stock Exchange*, 429 U.S. at 331) by increasing the price of the used car, airplane, or mobile home without previous Arkansas ties. Arkansas' taxing regime does not merely fail to ignore state lines in determining liability; it positively elevates them to the dispositive criterion upon which liability turns and, accordingly, upon which economic decisions are based.

B. Discrimination in Practical Effect

State taxes that discriminate in practical effect against interstate commerce are as offensive to the free trade purposes underlying the Commerce Clause as are taxes that explicitly discriminate against such commerce. The Court has consequently made it clear that the Commerce Clause bars taxes effectively discriminating against interstate commerce no less than taxes that do so by their terms. *See, e.g., American Trucking Ass'ns*; *Nippert v. Richmond*, 327 U.S. 416 (1946); *Best & Co. v. Maxwell*, 311 U.S. 454, 455-56 (1940).

In its practical operation, Arkansas' taxing scheme plainly discriminates against interstate commerce by inducing Arkansas consumers to make their purchases of used cars, airplanes, and mobile homes locally rather than in other states. A potential used car purchaser living in West Memphis, Arkansas, for example, might well find the best price for the car he wants on a car lot across the river in Memphis, Tennessee, or from a resident of Memphis, Tennessee. When, however, the purchaser discovers that he will be saddled with a four percent use tax that could be avoided if he bought the identical, though slightly more expensive, car in West Memphis, Arkansas, he will inevitably be swayed to make the Arkansas rather than the out-of-state purchase. It is difficult to imagine a more blatant disregard of this Court's admonition that a "State may no[t] . . . use discriminatory taxes to assure that [customers] direct their commerce to businesses within the State" thereby "favor[ing] local commercial interests over out-of-state businesses." *Boston Stock Exchange*, 429 U.S. at 334-35.

As the court below correctly observed, the statute does not by its terms favor the Arkansas over the out-of-state purchase. It is conceivable that a car sitting on a used car lot in Tennessee or in a Tennessean's driveway once bore an Arkansas sales or use tax[8] just as it is conceivable that a car sitting on a used car lot in Arkansas

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[8]For example, an auto dealer in Tennessee could have taken a car in trade from an Arkansan or an Arkansan could have moved to Tennessee.

or in an Arkansan's driveway did not.[9] But this does not save the tax. "In each case it is our duty to determine whether the statute under attack . . . will in its practical operation work discrimination against interstate commerce." *Best & Co.*, 311 U.S. at 455-456. In this case, as in the "the long-line of so-called 'drummer cases' beginning with *Robbins v. Shelby County Taxing District*, 120 U.S. 489 [1887]" involving taxes on itinerant merchants, "[t]o ignore the variations in effect which follow from application of the tax, uniform on the face of the ordinance, . . . is only to ignore those practical consequences." *Nippert*, 327 U.S. at 417-18, 431.

While it is therefore possible to imagine situations in which the Arkansas tax scheme will bear equally on local and out-of-state purchases, here, as in the drummer cases, "[t]he strong likelihood is the other way." *Id.* at 432. In the overwhelming majority of cases, a used car, airplane, or mobile home purchased in Arkansas will have previously borne an Arkansas sales or use tax whereas a used car, airplane, or mobile home purchased in another state will not. "This, of course, is but another way of saying that the very difference between interstate and local trade, taken in conjunction with the inherent character of the tax, makes equality of application as between these two classes of commerce, generally speaking, impossible." *Id.* Moreover, "[i]t is well settled that '[w]e need not know how unequal the Tax is before concluding that it unconstitutionally discriminates.'" *Bacchus*, 468 U.S. at 269 (quoting *Maryland v. Louisiana*, 451 U.S. at 760).[10]

Indeed, if there were any remaining doubt about the inconsistency of the decision below with this Court's precedents, *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963)

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[9]For example, an auto dealer in Arkansas could have taken a car in trade from a Tennessean or a Tennessean could have moved to Arkansas.

[10]The Arkansas Supreme Court's suggestion that there was no discrimination between in-state and out-of-state taxpayers (App. A 15a-16a) is therefore beside the point. "Our cases make clear that discrimination between in-state and out-of-state goods is as offensive to the Commerce Clause as discrimination between in-state and out-of-state taxpayers." *Bacchus*, 468 U.S. at 268 n.8.

removes it. In *Halliburton*, Louisiana taxed goods purchased in "isolated sales" outside the state for use in Louisiana while exempting goods purchased in "isolated sales" within Louisiana. As the Court observed, "isolated sales involve primarily the acquisition of second-hand equipment from previous users" (*id.* at 73)---precisely the fact pattern in this case. In striking down the tax, this Court declared:

> The effect of the tax is to favor local users who wish to dispose of equipment over out-of-state users similarly situated. Whatever the Louisiana Legislature's reasons for granting such an exemption to this segment of the local second-hand market, no attempt has been made to justify it or to show how its purpose would be defeated by extending the same exemption to similar out-of-state transactions. We therefore conclude that the use tax on isolated sales in this case departs from the equality required by *Silas Mason* and discriminates against interstate commerce.

Id. at 73-74 (footnotes omitted). Arkansas' tax scheme has the same forbidden "effect of. . .favor[ing] local users who wish to dispose of equipment over out-of-state users similarly situated" by limiting the exemptions for used airplanes, motor vehicles and mobile homes to property that has previously been taxed by Arkansas. *Id.*[11]

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[11] Arkansas' tax scheme violates the Commerce Clause for yet another reason -- it fails the "internal consistency" test. As we explain below (see p. 16 *infra*), the internal consistency test requires that a challenged tax, if applied by every state, bear no more heavily on interstate than on intrastate commerce. If every state exempted used property from sales or use tax only if it had previously been taxed in the state, then used property that never crossed state lines would be taxed only once whereas used property purchased in one state for use in another would frequently bear a double tax burden.

C. The Constitutional Irrelevance of Arkansas' We-Only-Tax-It-Once Defense

Despite this Court's unequivocal condemnation of taxing statutes that discriminate on their face or in effect against interstate commerce, the Arkansas Supreme Court reasoned that Arkansas' tax scheme passes constitutional muster because it "tax[es] only *one* sale or purchase of a particular airplane, motor vehicle, or mobile home, and no more." App. A 15a (emphasis in original). We are unaware of any instance in which this Court has upheld a discriminatory sales and use tax scheme based upon the fact that the state imposed the discriminatory tax "only one time" with respect to a particular taxpayer, transaction, or property item. In fact, many of the discriminatory taxes that this Court has struck down would have been upheld if states could impose a tax "one time" without regard to its effect on interstate commerce.

The Louisiana tax in *Halliburton*, for example, would have survived constitutional scrutiny if Louisiana could have imposed its sales or use tax "one time" with respect to each item of property sold or used in the state. However, this Court rejected Louisiana's argument that its discriminatory tax scheme was justified by the fact that "any item sold in a local isolated sale has already been subjected [*one time*] to either a sales tax if it was originally acquired in Louisiana or a use tax if was imported, whereas there is no assurance that an item acquired in an out-of-state isolated sale has ever sustained such a tax burden." *Id.* at 74, n. 8. *See, also, American Trucking Ass'ns, Inc.* (flat highway use tax invalidated even though only "one tax" was imposed upon each truck). Thus, Arkansas cannot discriminatorily apply its sales and use taxes just "one time" to sales and purchases of used cars, airplanes, or mobile homes without regard to their effect upon the free flow of such items in interstate commerce.

Furthermore, the discriminatory tax burden which Arkansas has imposed upon interstate commerce in favor of local sellers cannot be justified by the fact that local sellers may have previously paid Arkansas' sales or use tax when they acquired their property.

Out-of-state sellers of used cars, airplanes, and mobile homes may have previously paid an equal or even greater amount of tax to their home states when they acquired their property. Indeed, the original owners of the used airplane and car purchased by petitioners Brunner & Lay, Inc. and Robert M. Wilkinson paid a higher (five percent) sales or use tax to their home states when they acquired the property new than they would have paid to Arkansas had they purchased the items there. App. A 3a-5a. Nevertheless, when petitioners brought their used property into Arkansas, they were subjected to an additional four percent use tax -- a tax that would not have applied if the original owners had purchased the property in Arkansas or for use in Arkansas.[12]

D. The Constitutionality of Denying a Credit Against a Use Tax for Sales Taxes Imposed by Other States

The Arkansas Supreme Court also suggested that Arkansas' taxing scheme was nevertheless immune from attack on the theory that a state is not required to grant a credit against its use tax on out-of-state purchases for a sales tax paid to other states. See pp. 6-7 *supra*; App. 16a-17a. Whatever burden Arkansas' sales and use tax scheme imposed on interstate commerce, the court reasoned, was "much less . . . than would a perhaps permissible use tax with no credit available for an out-of-state sales tax." App. 16a-17a.

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[12]This discrimination is exacerbated by the fact that local sellers may resell their used property tax free regardless of whether they actually paid any tax to Arkansas after receiving a credit for taxes paid to another state. For example, an Arkansan who purchased a new airplane in Memphis, Tennessee and paid Tennessee's five percent sales tax was entitled to a credit against the Arkansas use tax for the Tennessee sales tax he paid. He may resell his used airplane tax free in Arkansas or to an Arkansas consumer despite the fact that he did not pay any Arkansas use tax after receiving credit for the tax he paid to Tennessee. On the other hand, a similarly situated resident of Memphis, Tennessee, who paid the same amount of Tennessee sales tax when he purchased an identical airplane, may not resell his used airplane tax free in Arkansas or to an Arkansas consumer because neither the Arkansas sales or use tax was applied when he acquired his property.

In our judgment, the Arkansas court's analysis rests on a false premise and therefore cannot rescue Arkansas' otherwise discriminatory taxing regime. While the Court "has expressly reserved the question whether a State must credit a sales tax paid to another State against its own use tax," *Williams*, 472 U.S. at 21-22, it is plain that the failure to do so would violate the Court's "internal consistency" doctrine. Under this doctrine, "'the [tax] must be such that, if applied by every jurisdiction,' there would be no impermissible interference with free trade." *Armco*, 467 U.S. at 644 (quoting *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983)) (brackets in original). If every state were to impose a use tax on out-of-state purchases without granting a credit for sales taxes paid to other states, the taxpayer purchasing property in one state for use in another would pay both a sales and a use tax, whereas the taxpayer purchasing property in a state for use in that state would pay but a single tax. The "impermissible interference with free trade" (*Armco*, 467 U.S. at 644), and the violation of the "internal consistency" doctrine, are apparent, a point Justice Scalia has recognized. *Tyler Pipe*, 483 U.S. at 255 (Scalia, J., dissenting).

Even if we are wrong in our view that the Court's Commerce Clause doctrine leaves no room for the denial of a credit against a state's use tax for an out-of-state sales tax, the question at a minimum is one of great national significance that warrants this Court's plenary consideration. If the Commerce Clause permits states to deny credits against use taxes for sales taxes paid to other states, thereby creating a powerful incentive for consumers to shop at home, it is incumbent upon this Court to explain how such a rule can be reconciled with "the fundamental principle that . . . [n]o State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'" *Boston Stock Exchange*, 429 U.S. at 329 (quoting *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959)).

II. THE QUESTIONS PRESENTED HAVE GREAT PRACTICAL SIGNIFICANCE

Wholly apart from the blatant inconsistency of the decision below with basic principles of this Court's Commerce Clause jurisprudence, the Arkansas Supreme Court's decision warrants review because of its great practical significance. Beyond the petitioners and thousands of other members of the taxpayer class whose purchases of used property were taxed because Arkansas had not previously taxed any other sale or use of the property, consumers in many other states, and the out-of-state businesses with whom they deal, are burdened with similar discriminatory taxes under taxing regimes like Arkansas'. Nine states, for example, provide an exemption from sales or use tax for the sale of a mobile or manufactured home if that state has previously taxed any prior transaction involving the same property.[13] Two other states provide an exemption from their sales taxes for the transfer of a vehicle pursuant to a corporate organization, reorganization, or liquidation,

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[13]Colo. Rev. Stat. §§ 39-26-114(10), 39-26-203(1)(o) (1990) (sales and use tax exemptions for mobile homes previously subject to Colorado sales or use tax); Iowa Code Ann. § 423.4(11) (West 1990) (use tax exemption for mobile homes previously subject to Iowa use tax); Minn. Stat. Ann. § 279A.25(27) (West 1991) (sales tax exemption for manufactured homes used for residential purposes unless the sale is the first retail sale of the home in Minnesota); Mo. Ann. Stat. § 144.011.1(11)(c) (Vernon Supp. 1992) ("sale at retail" does not include sale of manufactured homes first transferred after December 31, 1985 if Missouri sales tax has been paid on a prior transaction); Nev. Rev. Stat. Ann. §§ 372.316(2), 374.321(2) (Michie Supp. 1991) (sales and use tax exemptions for used manufactured or mobile homes previously subject to Nevada sales or use tax); N.M. Stat. Ann. § 7-9-76.1 (1990) (gross receipts from the sale of manufactured homes deductible from tax base if home was subject to New Mexico gross receipts, compensatory, or motor vehicle excise tax upon its initial sale or use in New Mexico); N.D. Cent. Code § 57-39.2-04(35) (1983 & Michie Supp. 1991) (sales tax exemption for sale of mobile homes by person who first acquired it at retail if previously subject to North Dakota sales tax); Wash. Rev. Code Ann. §§ 82.08.033(1), 82.45.032 (West Supp. 1992) (sales tax exemption for "used mobile homes," defined as mobile homes previously subject to Washington sales or use tax); Wyo. Stat. § 39-6-405(a)(xvii) (1990 & Supp. 1991), Wyo. Sales and Use Tax Rule § 37, reported in [Wyo] St. Tax Rptr. (CCH) ¶ 63-937 (1992) (sales tax exemption for transportable homes upon which Wyoming sales tax has previously been paid).

so long as the state has previously taxed a prior transaction involving the same property.[14] California has subjected vehicles purchased outside the state to higher valuations than identical vehicles purchased in California,[15] while Florida charges an "impact fee," in addition to ordinary registration fees and use taxes, for vehicles brought into Florida from other states.[16]

Nor have the states confined their discriminatory taxing schemes to motor vehicles, mobile homes, and airplanes. Analogous tax preferences for in-state over out-of-state activities can be seen in state statutes that limit tax-free exchanges of like-kind property to property that has a situs within the taxing state;[17] that limit corporate dividend deductions based on the in-state presence of the dividend payor;[18] that exempt interest from state and municipal

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[14]Conn. Gen. Stat. Ann. § 12-431(a)(2)(A) (West Supp. 1992) (use tax exemption for the casual sale of motor vehicle, vessel, snowmobile, or aircraft transferred pursuant to a corporate organization, reorganization, or liquidation if the transfer is free from federal tax, the asset is transferred to the transferor's or shareholder's corporation, and the last taxable sale or transfer of the asset was subject to Connecticut sales or use tax); Mich. Comp. Laws Ann. § 205.93.3(3)(c) (West 1986 & Supp. 1991); Mich. Sales and Use Tax Rule R 205.135, reported in [1 Mich.] St. Tax Rptr. (CCH) ¶ 65-267 (1992) (use tax exemption for transfer of a vehicle, mobile home, aircraft, snowmobile, or watercraft in connection with the organization, reorganization, dissolution, or partial liquidation of an incorporated or unincorporated business in which the beneficial ownership does not change, if the vehicle, etc. has previously been subject to the Michigan sales or use tax).

[15]*Woosley v. California*, 234 Cal. App. 3d 647, 266 Cal. Rptr. 385 (2d Dist. 1990), *review granted*, 791 P.2d 337 (Cal. 1990).

[16]Fla. Stat. Ann. § 319.231 (West Supp. 1992).

[17]Ga. Code Ann. §§ 48-7-21(b)(5), 48-7-27(b)(6) (Supp. 1991); Or. Rev. Stat. § 314.290(1) (1991); S.C. Code Ann. § 12-7-430(b)(5) (Law. Co-op. Supp. 1991); La. Rev. Stat. Ann. § 47:287.71(A)(4) (West 1990).

[18]Ariz. Rev. Stat. Ann. §§ 43-1128(A), 43-1122(5) (Supp. 1991); Cal. Rev. & Tax. Code § 24402 (1992); Haw. Rev. Stat. § 235-7(c)(3) (1992); Idaho Code § 63-3022(f) (1989 & Michie Supp. 1991); La. Rev. Stat. § 47:287.73(C)(1) (West 1990).

bonds if issued by the state or its political subdivisions but not if issued by other states or their political subdivisions.[19]

The threat that these statutes, and others like them, pose to the free trade purposes underlying the Commerce Clause is self-evident. Left uncorrected, the decision of the Arkansas Supreme Court will encourage legislatures in Arkansas and other states to enact such taxing schemes that favor in-state over out-of-state interests. Moreover, state courts will be encouraged to uphold discriminatory taxes on wholly indefensible grounds with the realistic hope of surviving the certiorari lottery.

Because the decision below is irreconcilable with this Court's Commerce Clause precedents and, if left undisturbed, will likely lead to the proliferation of discriminatory taxing regimes, the Court should grant certiorari in this case. Alternatively, because the decision below is patently wrong on the merits, the judgment of the Arkansas Supreme Court should be summarily reversed.

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[19] *See* 1 Multistate Corp. Income Tax Guide (CCH) ¶ 75 (1992).

CONCLUSION

The Court should issue a writ of certiorari to review the judgment of the Arkansas Supreme Court or, in the alternative, to reverse summarily the Arkansas Supreme Court's judgment.

Respectfully submitted,

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APPENDIX

APPENDIX A

SUPREME COURT OF ARKANSAS

No. 90-293

JIM C. PLEDGER, Commissioner of Revenues, et al. APPELLANTS,	*	APPEAL FROM THE PULASKI COUNTY CHANCERY COURT,
V.	*	No. 86-4305 HON. LEE A. MUNSON,
Brunner and Lay, Inc., et al. APPELLEES	*	CHANCELLOR

Opinion Delivered March 2, 1992

REVERSED AND REMANDED

LONNIE R. BEARD, SPECIAL JUSTICE

This case involved what has been styled as an illegal exaction action brought by the named appellees in their own behalf and as representatives of classes of taxpayers similarly situated. The specific transactions involved in this case were purchases, by the named appellees, of a used airplane, a used motor vehicle, and a used mobile home. All three items were purchased outside of Arkansas for use in this State, and the Arkansas Department of Finance and Administration has imposed or has sought to impose a use tax on these transactions.

Under the Arkansas sales and use tax exemption scheme in effect at the time of the transactions involved in this case, the purchases at issue herein would have been exempted from the Arkansas use tax if an Arkansas sales or use tax had been imposed with respect to any prior sale or purchase of the airplane, motor

vehicle, or mobile home. Moreover, the purchase of the motor vehicle and mobile home would have been exempted if they had previously been registered with the Arkansas Department of Motor Vehicles, regardless of whether an Arkansas sales or use tax had been imposed with respect to a prior sale or purchase of the item.

This is an appeal from the decision of the Pulaski County Chancery Court, First Division, Chancellor Lee A. Munson. The Chancellor ruled that the Arkansas sales and use tax exemption scheme discriminated against the named appellees and class members in violation of the equal protection provisions of the Fourteenth Amendment and discriminated against interstate commerce in a manner prohibited by the commerce clause of the Constitution of the United States. The Chancellor enjoined collection of the use tax from the taxpayers represented in the certified classes who had not yet paid the tax, and ordered that class members who had already paid the tax be permitted to seek refunds if such claims were not barred by the applicable statute of limitations.

Appellants, a class of defendants representing State, county, and municipal taxing authorities, challenge these rulings and in addition raise several procedural issues, principally involving the propriety of the class certifications. We find it unnecessary to address the procedural issues in detail, because we disagree with the Chancellor's rulings on both the equal protection and commerce clause issues. Reversed and Remanded.

I

Appellee Brunner & Lay, Inc.

Appellee Brunner & Lay, Inc. is a Delaware Corporation which has a manufacturing sales facility located in Springdale (Washington County), Arkansas. On April 4, 1984, Brunner & Lay, Inc. purchased a used airplane in Massachusetts for $825,000 from another corporation. The corporate seller had originally purchase the airplane new, and had paid a Massachusetts use tax on

that original purchase. However, no Massachusetts sales tax was paid with respect to the sale to Brunner & Lay, Inc.

After audit, the Arkansas Department of Finance and Administration proposed an assessment of a four percent State and a one percent (subject to a $25 limit) Washington County use tax with respect to the storage and use of the airplane in Arkansas. The proposed assessment of the State use tax was made under a general use tax provision levying an excise tax on the "privilege of storing, using, or consuming within this State any article of tangible personal property purchased for storage, use, or consumption in this state...."[1] A credit against the Arkansas use tax would be allowable for any sales or use tax paid by Brunner & Lay, Inc. to another State with respect to the purchase of the airplane,[2] but since no such tax was paid, no credit against the Arkansas use tax is available.

If the airplane had been purchased in Arkansas it would generally have been subject to comparable State and county sales taxes.[3] Exemptions from both the Arkansas sales and use taxes would have been available, however, if an Arkansas sales or use tax had been imposed with respect to a previous sale of the airplane,[4] but no exemption or credit was allowable for sales or use taxes paid to other States with respect to prior sales of the airplane.

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[1] As to the State use tax imposed, see specifically Ark. Code Ann. §§ 26-53-106 and 26-53-107 (1987), and see, generally, Ark. Code Ann. §§ 26-53-101 et. seq. One percent countywide use taxes, subject to a limit of $25 with respect to a single transaction, are authorized by Ark. Code Ann. §§ 26-74-201 et. seq.

[2] Ark. Code Ann. § 26-5-101(V) (1987).

[3] See Ark. Code Ann. §§ 26-52-301(1) and 26-52-302 (1987) as to the State sales tax and Ark. Code Ann. § 26-74-201 et. seq. as to county sales taxes.

[4] These exemptions were partially eliminated by 1991 Act No. 3, § 5. However, before the amendment, the sales and use tax exemptions were located at Ark. Code Ann. §§ 26-52-505(b) and Ark. Code Ann. § 26-53-112(2) (1987), respectively.

Brunner & Lay, Inc. objected to the proposed assessment, and the Arkansas use tax has not been assessed or paid.

Appellee Robert Wilkinson

On December 12, 1985, Robert N. Wilkinson, a resident of Lee County, Arkansas, purchased a used automobile in Tennessee. A Tennessee sales tax had been imposed when the automobile had originally been purchased new in Tennessee, but no Tennessee sales tax was imposed with respect to the sale to Mr. Wilkinson.

On bringing the automobile to Arkansas, Mr. Wilkinson paid a four percent State[5] and a one percent county[6] (subject to a $25 limit) use tax at the time he registered the automobile in Arkansas. A credit would have been allowed to Mr. Wilkinson if he had paid a sales or use tax to another State with respect to his purchase of the automobile.[7]

If the automobile had been purchased in Arkansas, it would generally have been subject to comparable State and county sales taxes.[8] However, the purchase of the automobile in Arkansas would have been exempted from the sales tax if an Arkansas sales or use

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[5] The State sales tax was imposed by Ark. Code Ann. §§ 26-53-106(a) and 26-53-107(1987).

[6] The county use tax was authorized by Ark. Code Ann. § 26-74-201 et seq. The $25 limit is imposed by Ark. Code Ann. § 26-74-220(a) (1987).

[7] Ark. Code Ann. § 26-5-101(V) (1987).

[8] See Ark. Code Ann. §§ 26-52-301(1) and 26-52-302(a) (1987) as to State sales taxes and Ark. Code Ann. §§ 26-74-201 et. seq. for the legislative authorization of countywide sales taxes.

tax had been imposed on a prior sale of the automobile.[9]

Wilkinson subsequently filed a claim for refund of the tax, but such claim was denied.

Bobby and Georgia McLaughlin

On August 3, 1984, Bobby and Georgia McLaughlin, residents of Nashville, Arkansas, purchased a used mobile home in Oklahoma. The McLaughlins paid a four percent Arkansas use tax at the time the mobile home was registered in Arkansas. A credit would have been allowable against the Arkansas tax for any sales tax paid to Oklahoma with respect to the purchase, but since no such sales tax was paid, no credit was allowable.

The mobile home would generally have been subject to a comparable sales tax if the purchase had been made in Arkansas, but an exemption would have been allowable with respect to both the Arkansas sales and use tax if an Arkansas sales or use tax had been imposed on a previous sale of the mobile home.[10]

No administrative claim for refund was filed by the McLaughlins.

II
Procedure

Appellants raise several procedural issues concerning the propriety of the class certifications below and the nature of the

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[9] The exemption from the State sales tax was found at Ark. Code Ann. § 26-52-510(b) before its amendment by 1991 Act No. 3, § 6, which repealed the exemption with respect to sales of automobiles for a total consideration of more than $2,000. The exemption from the State use tax was provided by Ark. Code Ann. § 26-53-126(b) (1987). This exemption was similarly curtailed by 1991 Act No. 3, § 7.

[10] This exemption was also partially repealed by 1991 Act No. 3, § 4.

actions. Appellants conclude that "only Appellee Brunner & Lay, Inc. and its class of post-suit airplane purchasers, and Appellee Wilkinson have standing to prove this case." Even if this court were to agree with this conclusion, a matter we need not decide, the issue of the constitutional validity of the general sales and use tax exemption scheme in question would still be properly before this court. Because we believe our disposition of the constitutional issues would have a similar impact whether the class of appellees is as broad as certified by the Chancellor or as narrow as claimed by the appellants, we decline to rule on the propriety of the class certifications.

III
Equal Protection

The Chancellor concluded that the Arkansas sales and use tax exemption scheme impermissibly discriminated against out-of-state purchases, for use or storage in Arkansas, of used airplanes, motor vehicles, and mobile homes. In the Chancellor's view, there were two fatal distinctions made in the exemption scheme between sales of used airplanes, motor vehicles, and mobile homes in Arkansas and purchases of such used items outside of Arkansas for use or storage in this State.

First, the essential thrust of the Arkansas sales and use tax exemption scheme was to exempt sales and purchases of used airplanes, motor vehicles, and mobile homes with respect to which an Arkansas sales or use tax had been imposed on a previous sale or purchase, If, for example, a new motor vehicle (or airplane or mobile home) were sold in Arkansas and an Arkansas sales tax paid with respect to that sale, a subsequent sale of that motor vehicle (or airplane or mobile home) was exempt from both the Arkansas sales and use tax. Under this scheme most sales of used motor vehicles in Arkansas were exempted from an Arkansas sales or use tax because, as a practical matter, an Arkansas sales or use tax would usually have been previously paid when the motor vehicle had originally been sold new in Arkansas.

On the other hand, if, for example, a used motor vehicle (or airplane or mobile home) were purchased in another State for use or storage in Arkansas, it would generally not be exempted from the Arkansas use tax, even if a sales or use tax of another State had previously been imposed with respect to the original sale of the motor vehicle when it was new, since the Arkansas exemption was generally available only where an Arkansas sales or use tax, not that of some other state, had been imposed with respect to a prior sale or purchase of the motor vehicle.

The second fatal distinction, in the view of the Chancellor, made by the Arkansas sales and use tax exemption scheme was relevant only to sales and purchase of used motor vehicles and mobile homes. Sales or purchases of these items, but not airplanes, was exempted from an Arkansas sales or use tax if the motor vehicle or mobile home had previously been registered with the Arkansas Department of Motor Vehicles, regardless of whether a prior sale of such items had been subjected to an Arkansas sales or use tax.[11] For example, if a motor vehicle were purchased new in another State by a resident of that State for use there, that sale would not be subject to an Arkansas sales or use tax. If the purchaser subsequently moved to Arkansas and registered the motor vehicle (or mobile home) with the Arkansas Department of Motor Vehicles[12], no sale or use tax would be imposed at the time of registration because the registration itself would not be a taxable event under the Arkansas sales and use tax provisions. A subsequent sale of the motor vehicle after registration in Arkansas would then be exempted from an Arkansas sales or use tax even though no such Arkansas tax had ever been imposed on a prior sale

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[11] See, before amendment by 1991 Act No. 3, §§ 3, 4, and 7, Ark. Code Ann. §§ 26-52-510(b)(2), 26-52-504(b), 26-52-504(c), 26-53-126(3), and 26-53-112(2) (1987).

[12] Motor vehicles and mobile homes are required to be registered with the Arkansas Department of motor vehicles. Airplanes, on the other hand, are not. See Ark. Code Ann. § 27-14-701 et. seq.

or purchase of the vehicle.

We address these distinctions separately, since only the first is potentially applicable to sales and purchases of all three types of properties (airplanes, motor vehicles, and mobile homes) involved in this case.

The Supreme Court of the United States has often said that "States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." See *Williams v. Vermont*, 472 U.S. 14, 22; 105 S.Ct. 2465, 2471; 86 L.Ed.2d 11, 19 (1985). The Arkansas sales and use tax scheme which exempts sales of used airplanes, motor vehicles, and mobile homes with respect to which an Arkansas sales or use tax was imposed on a prior sale or purchase will be upheld against an equal protection challenge "if the legislature could have reasonably concluded that the challenged classification would promote a legitimate state purpose." *Williams v. Vermont, supra*, 472 U.S. at 22-23; 105 S.Ct. at 2471; 86 L.Ed.2d at 19. The parties in this case did not argue nor did the Chancellor conclude that a higher standard of scrutiny was required to evaluate the Arkansas sales and use tax scheme.

As this court recently reiterated, the "power to tax necessarily implies the power to discriminate in taxation." *Bosworth v. Pledger*, 305 Ark. 598, 608; 810 S.W.2d 918, 922 (1991). This court will presume that the challenged classification will promote a legitimate State purpose, and thus pass equal protection muster, if there is "any conceivable set of facts to uphold the law's rational basis...." *Bosworth v. Pledger*, 305 Ark. at 608; 810 S.W.2d at 922-923. We can presume a legitimate State purpose from either the actual reasons for the legislative classification or from reasons we can hypothesize. *Bosworth v. Pledger*, 305 Ark. at 608; 810 S.W.2d at 923.

Appellants advanced the theory that the exemption for used motor vehicles and motor homes with respect to which an Arkansas

sales or use tax had been imposed on a prior sale or purchase was intended to lessen the burden on lower income residents of Arkansas who are more likely to seek transportation or shelter through purchase of a used motor vehicle or mobile home. Appellants suggested that the exemption for airplanes with respect to which an Arkansas sales or use tax had previously been imposed was simply another of the many credits and incentives the Arkansas legislature has granted to businesses, that lessening the tax burden with respect to sales and purchases of used aircraft would make such aircraft more affordable to Arkansas businesses, and make businesses which could utilize aircraft more competitive.

The Chancellor rejected these arguments and concluded that no legitimate State purpose was served by basing an exemption on whether a prior sale of the airplane, motor vehicle, or mobile home had been subject to an Arkansas sales or use tax. If helping the poor and helping Arkansas businesses by making used motor vehicles, mobile homes, and airplanes more affordable was to be the purpose of the sales and use tax exemptions, concluded the Chancellor, "[t]hese state purposes would have been better served by exemption all sales and purchases of used airplanes, motor vehicles and mobile homes." (Emphasis added).

The Chancellor's conclusion reflects an overly restrictive view of the scope of the legislative discretion in exercising its taxing powers, and ignores the competing interests the legislature must balance in determining whether and to what extent to exercise those taxing powers.

Taxing all sales and purchases of airplanes, motor vehicles, and mobile homes, including those that may have been subjected to one or more prior Arkansas sales or use taxes would obviously maximize the revenue raising potential of sales of such items.[13] On

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[13] The legislature has in fact now moved further in the direction of maximizing revenues by partially repealing the exemptions at issue in this case. See 1991 Act No. 3.

the other hand, exemption all such sales and purchases from the Arkansas sales and use tax would maximize the objective of making motor vehicles and mobile homes more affordable to the lower income residents of this State, and airplanes more affordable to Arkansas businesses which could utilize them.

However, this court will not force the legislature to choose between these competing considerations as if they were all-or-nothing, mutually inconsistent, objectives, We believe the legislature could engage in a rational balancing of objectives.

Although the sales and use tax is a transactional tax rather than a property tax, the tax nevertheless becomes part of the tax history of a particular item. The legislature could have rationally concluded that a particular motor vehicle's use of the State's roadways, a mobile homes' benefit from police and fire protection, and an airplane's use of the State's airport facilities throughout their respective useful lives in Arkansas justify taxing at least one sale or purchase of such items as a means of raising revenues.

That the legislature also determines that considerations of equity to lower income residents and a wish to encourage the growth of Arkansas businesses mitigate against taxing additional, sequential sales and purchases of airplanes, motor vehicles, and mobile homes is a choice within its rational discretion.

The second fatal distinction made in the sales and use tax scheme, in the view of the Chancellor, existed only with respect to motor vehicles and mobile homes. Sales of such were exempted from the Arkansas sales and use tax if they had been previously registered with the Arkansas Department of Motor Vehicles whether or not an Arkansas sales or use tax had been paid on a prior sale or purchase of the item. The reason for this distinction, we hypothesize, was one of administrative convenience, coupled, again, with considerations of equity. The language of the exemption with respect to motor vehicles, we believe, supports this hypothesis, in providing that it is the intent of the legislature to exempt motor

vehicles which have already been subjected to a sales or use tax "as evidenced by previous registration in the State of Arkansas." Ark. Code Ann. § 26-52-510(b)(2) (1987). (Emphasis added).

The initial registration of a motor vehicles or mobile home in Arkansas was the point at which Arkansas taxing authorities insured the enforcement and collection of any applicable, yet unpaid, Arkansas sales or use tax. On the other hand, that initial registration would be an appropriate point for insuring the collection of the sales or use tax only if the registration accompanied a sale or purchase of a motor vehicle or mobile home which would properly be subject to an Arkansas sales or use tax. If a motor vehicle or mobile home were purchased out of this State in a transaction not properly subject to an Arkansas sales or use tax, and the purchaser subsequently moved to Arkansas and registered the motor vehicle or motor home, no Arkansas sales or use tax would have been due at the time of registration. The registration itself is not the taxable event under the sales and use tax scheme, only the point at which any properly imposed but unpaid Arkansas sales or use taxes would be collected.

It appears that the Arkansas legislature might have taken one of three possible approaches to the potential "loophole" of exempting previously registered motor vehicles and mobile homes regardless of whether an Arkansas sales or use tax had been imposed with respect to a prior sale or purchase. First, it could have imposed a tax on the initial act of registration itself where no Arkansas sales or use tax had been properly payable on a prior sale or purchase of that particular motor vehicle or mobile home. A tax on the act of registration itself was upheld by the highest court of West Virginia with respect to the registration of a motor vehicle in that State even though the motor vehicle had been purchased out of state by a nonresident who subsequently moved to West Virginia, and even though no credit was given against the registration tax for the sales tax paid on the purchase in the other State. See *J.C. Penney Co., Inc. v. Hardesty*, 264 S.E.2d 604 (W.Va. 1979).

Second, the legislature could have eliminated the focus on the initial registration as the point at which an properly imposed but unpaid Arkansas sales and use taxes would be collected. Thus, a sale or purchase of a motor vehicle or mobile home could be subjected to an Arkansas sales or use tax if no such tax had been imposed on a prior sale or purchase of the item even if the particular motor vehicle or mobile home had previously been registered in Arkansas.

The third approach, and the one chosen, was to tie the collection of a properly imposed Arkansas sales or use tax to the initial registration only. Potential justifications for this choice are not difficult to discern. If the first registration were not the point at which unpaid sales or use taxes were collected, those who purchased a used motor vehicle or mobile home would not be able to simply rely on a prior registration in Arkansas as evidence of an exemption from the sales or use tax. The legislature could have rationally concluded that the administrative burden of having to ascertain the actual prior sales and use tax history of a particular motor vehicle or mobile home each time a new owner sought to register it outweighed any potential revenue loss resulting from simply relying on a prior registration in Arkansas for proof that the exemption were applicable.

Commerce Clause

The Chancellor determined that the same two distinctions inherent in the Arkansas sales and use tax exemption scheme that denied appellees as a class equal protection under the laws also discriminated against interstate commerce in violation of the Commerce clause of the Constitution of the United States.[14] Because sales and purchases of used airplanes, motor vehicles, and

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[14] The commerce clause, Article 1, § 8, cl. 3, gives Congress the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

mobile homes were generally exempted from the Arkansas sales and use tax only where an Arkansas sales or use tax had been imposed with respect to a prior sale or purchase or, in the case of motor vehicles and mobile homes, if the item had previously been registered with the Arkansas Department of Motor Vehicles, the Chancellor concluded that "The effect of Arkansas' sales and use tax scheme is to favor Arkansans who wish to dispose of their used property over similarly situated residents of other states who wish to dispose of the same types of property."

The commerce clause "has served as the battleground for the majority of use tax litigation."[15] The Supreme Court over forty years ago noted that "The history of this problem is spread over hundreds of volumes of our Reports." *Freeman v. Hewitt*, 329 U.S. 249, 252; 67 S.Ct. 274, 276; 91 L.Ed. 265, 271 (1946). More recently the court has referred to its commerce clause cases "as a 'quagmire' of judicial responses to specific state tax measures...." *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266, 280; 107 S.Ct. 2829, 2838; 97 L.Ed.2d 226, 241 (1987).

The court first upheld a general use tax scheme as a counterpart to a State's general sales tax scheme in *Henneford v. Silas Mason Co., Inc.*, 300 U.S. 577; 57 S.Ct. 524; 81 L.Ed. 814 (1937). Ironically, the premise of that decision seemed to be that the typical use tax is not a tax on interstate commerce at all. "The tax is not upon operations of interstate commerce, but upon the privilege of use after commerce is at an end." 300 U.S. at 582; 57 S.Ct. at 526; 81 L.Ed. at 818.

However, the notion that a typical use tax need not be evaluated in terms of commerce clause limitations was at least impliedly rejected by *Halliburton Oil Well Cementing Company v. Reily*, 373 U.S. 64, 83 S.Ct. 1201; 10 L.Ed.2d 202 (1963). This

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[15] Comment, "Compensating Use Taxes: Past and Present Constitutional Problems in Imposition and Collection," 18 *Ark L.Rev.* 321, 326 (Winter 1965).

case, on which the Chancellor principally relied, struck down a Louisiana use tax as applied to an out-of-state purchase of a used airplane for use in Louisiana. The purchase would have qualified for an "isolated sales" exemption if the sale had taken place in Louisiana, but there was no equivalent exemption under the use tax for similar out-of-state purchases. The court said that "The conclusion is inescapable; equal treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state." 373 U.S. at 70; 83 S.Ct. at 1204; 10 L.Ed.2d at 207. The court indicated that the effect of limiting the isolated sales exemption to in-state sales only "is to favor local users who wish to dispose of equipment over out-of-state users similarly situated." 373 U.S. at 73-74; 83 S.Ct. at 1206; 10 L.Ed.2d at 209.

Halliburton, however, is not the last word on what is required for a use tax to satisfy commerce clause limitations. The Supreme Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed 326 (1977) set out a four-part test to be applied in determining the constitutionality under the commerce clause of a Mississippi gross receipts tax imposed on the privilege of doing business in Mississippi. Under this test a tax affecting interstate commerce would be valid if it (1) "is applied to an activity with a substantial nexus with the taxing State", (2) "is fairly apportioned", (3) "does not discriminate against interstate commerce", and (4) "is fairly related to the services provided by the State."

This court has accepted that the *Complete Auto Transit* tests will be applicable "whenever there is a challenge to any state tax on interstate commerce"[16], but application of these tests to this case seems to provide little assistance in our analysis. The first and fourth prongs of the test seem easily satisfied. The named individual appellees were residents of Arkansas at the time of the purchases of the motor vehicle and mobile home involved herein,

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[16] See *Burlington Northern R. Co. v. Ragland*, 280 Ark. 182, 186; 655 S.W.2d 437, 439 (1983).

and both out-of-state purchases were for use and storage in Arkansas. The Delaware corporation which purchased the used airplane had a permanent residence in this State through location of a manufacturing and sales facility in Springdale. If these contacts are insufficient to satisfy the first and fourth prongs, it would be difficult to imagine a use tax that could be properly imposed, and in fact the appellees do not argue nor did the Chancellor find that there were insufficient contacts with this State to justify imposition of the use tax.

The second prong, that the tax be fairly apportioned, is also satisfied. The Supreme Court has indicated that that requirement is clearly met with respect to a use tax where a credit is allowable for any sales tax paid to another State with respect to the same purchase. *D.H. Holmes Co. Ltd v. McNamara*, 486 U.S. 24, 31; 108 S.Ct. 1619, 1623-1624; 100 L.Ed.2d 21, 28 (1988).

The primary thrust of the appellees' argument and the Chancellor's finding go to the third prong, that the tax not discriminate against interstate commerce, and that brings us back to *Halliburton, supra*, and we believe that case to be distinguishable. The exemption at issue therein (for isolated sales taking place within the State of Louisiana only) was one which expressly depended on where the transaction took place.

The principal object of the Arkansas sales and use tax exemption scheme, on the other hand, was to tax only one sale or purchase of a particular airplane, motor vehicle, or mobile home, and no more. It should be emphasized that the exemption did not depend on the residency of either the seller or the buyer, or on the location, in or out of this State, of the sale or purchase transaction. As noted previously, the individual appellees were residents of Arkansas at the time of the purchases at issue, and the Delaware corporation had a permanent presence in this State. A purchase out of state of an airplane, motor vehicle, or mobile home for use in Arkansas would qualify for the exemption if the particular item had been subjected to an Arkansas sales or use tax with respect to a

prior sale or, in the case of a motor vehicle or mobile home, the item had been previously registered with the Arkansas Department of Motor Vehicles. In this sense, the Arkansas exemption scheme did insure "equal treatment for in-state and out-of-state taxpayers similarly situated...." *Halliburton, supra*, 373 U.S. at 70, 83 S.Ct. at 1204, 10 L.Ed.2d at 207.

It should be noted that the Supreme Court "has expressly reserved the question whether a State must credit a sales tax paid to another State against its own use tax." *Williams v. Vermont*, 472 U.S. 14, 21-22; 105 S.Ct. 2465, 2471; 86 L.Ed.2d 11, 18 (1985). This leaves open the possibility that a State could impose a use tax on an out-of-state purchase for use, storage, or consumption within the taxing State, even though the very same purchase with respect to which the use tax is imposed was also subjected to a sales tax by the State in which the sale took place. The policy reason for such a possibility seems clear enough. In the use tax situations of the sort involved in this case, the use State may have far greater contacts and provide far more services with respect to the purchased property than the sales State, yet a full credit by the use State of the tax imposed by the sales State would mean that in those cases where the sales tax equals or exceeds the use tax, no use tax would be collected. The Supreme Court has said that "A state, for many purposes, is to be reckoned as a self-contained unit, which may frame its own system of burdens and exemptions without heeding systems elsewhere." *Henneford v. Silas Mason Co., supra*, 300 U.S. at 587, 57 S.Ct. at 529, 81 L.Ed. at 821. In the purchases involved herein, in the absence of the Arkansas use tax, no tax would have been paid to Arkansas or any other State with respect to the named appellees' purchases of the airplane, motor vehicle, and mobile home.

Surely, the Arkansas sales and use tax exemption scheme, that essentially required that an Arkansas sales or use tax be imposed with respect to <u>one</u> sale or purchase transaction only, and allowed a credit against the use tax for any out-of-state sales tax imposed on the same purchase, imposed much less of a burden than would a

perhaps permissible use tax with no credit available for an out-of-state sales tax.

We disagree with the Chancellor's conclusions on this issue, also. Accordingly, we reverse and remand for action consistent with this opinion.

Special Justices Steven W. Elledge, David C. Shelton and Berl S. Smith, Sr., join in this opinion.

Dudley, Newbern, Corbin, and Brown, JJ., not participating.

APPENDIX B

IN THE CHANCERY COURT OF PULASKI COUNTY, ARKANSAS
FIRST DIVISION

BRUNNER AND LAY, INC.; ROBERT M. WILKINSON,
On Behalf of Themselves and All Other
Similarly Situated Taxpayers, PLAINTIFFS,

vs. No. 86-4305

JIM C. PLEDGER, Commissioner of Revenues;
JIMMIE LOU FISHER, Treasurer of the State
of Arkansas; JOAN R. PERRY, Treasurer of
Washington County, Arkansas;
CHARLES A. JOHNSON, County Judge of Washington
County, Arkansas, DEFENDANTS.

Filed April 23, 1990

FINDINGS OF FACT
AND CONCLUSIONS OF LAW

From the pleadings, stipulations, evidence adduced at trial, and briefs of the parties, the Court being well and sufficiently advised as to the facts and law in this case makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. Brunner and Lay, Inc. is a Delaware corporation which has a manufacturing and sales facility located in the City of Springdale, County of Washington, Arkansas.

2. On April 4, 1984, Brunner and Lay, Inc. purchased a used airplane from Gary Chemical Corporation in Leominster, Massachusetts, for $825,000. Gary Chemical Corporation had

previously purchased the airplane new for $1,150,000 on March 1, 1983, in Rockford, Illinois, and paid a five percent use tax in the amount of $57,500 to the State of Massachusetts.

3. After conducting an audit of Brunner and Lay, Inc. in April of 1986, the Arkansas Department of Finance and Administration notified Brunner & Lay, Inc. by letter dated May 27, 1986, of the proposed assessment of Arkansas' four percent use tax ($33,000) and the one percent Washington County use tax ($25 limit) for storage and use of the airplane in Arkansas.

4. Brunner and Lay, Inc. has not paid the Arkansas and Washington County use tax.

5. On December 12, 1985, Robert N. Wilkinson, a resident of Brickeys, Arkansas, purchased a used 1985 automobile in Memphis, Tennessee, for $12,588. The vehicle had originally been purchased new by a resident of Memphis, Tennessee who paid Tennessee's five percent sales tax when he registered and licensed the automobile in Tennessee.

6. Upon bringing the automobile to Arkansas, Mr. Wilkinson registered it at the Marianna office of the Arkansas Department of Finance and Administration at which time he paid Arkansas' four percent use tax ($503.52) and the one percent Lee County use tax ($25.00 limit).

7. Bobby and Georgia McLaughlin are residents of Nashville, Arkansas, who purchased a used 1970 mobile home in July of 1984 in Salisaw, Oklahoma. The purchase price was $1,000. No sales tax was paid by the McLaughlins to the State of Oklahoma.

8. On August 3, 1984, the McLaughlins registered the mobile home with the Arkansas Department of Finance and Administration office in Nashville, Arkansas, and paid Arkansas' four percent use tax ($40.00).

9. Plaintiff Robert M. Wilkinson and other taxpayers filed a claim for refund on September 19, 1986 pursuant to Ark. Stat. Ann. § 84-4726 (the predecessor to Ark. Code Ann. § 26-18-507). The claim specifically stated that it was filed on behalf of the named taxpayers and all other similarly situated taxpayers for which the statute of limitations for filing a claim for refund had not expired. The claim for refund was denied by the Commissioner in a letter dated September 29, 1986 and the Plaintiffs filed this lawsuit as a class action suit that same day. On October 1, 1987, this Court ordered counsel for the Plaintiffs to file an additional protective claim for refund on behalf of all taxpayers represented by this suit. This protective claim was filed by counsel for the Plaintiffs on October 1, 1987 and it too was denied by the Commissioner.

10. Plaintiffs have been certified as class representatives for all similarly situated taxpayers; the Washington County Judge and Treasurer have been certified as Defendant class representatives for all Arkansas counties which have adopted a local use tax, and the City of Fayetteville has been certified as Defendant class representative for all Arkansas cities which have adopted a local use tax.

Conclusions of Law

I.

The Court has jurisdiction over the parties and over the subject matter of this action.

This is an illegal exaction suit to enjoin the collection of Arkansas' four percent (4%) sales and use taxes[1] and the one percent (1%) local sales and use taxes[2] from Plaintiff Brunner and Lay, Inc. and all other similarly situated taxpayers as an illegal

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[1] Ark. Code Ann. §§ 26-52-101 et. seq. and 26-53-101 et. seq.

[2] Ark. Code Ann. §§ 26-74-201 et. seq. and 26-75-201 et. seq.

exaction; to enjoin the appropriation and expenditure of such taxes illegally exacted; and to order an accounting and a refund of such taxes illegally exacted.

Plaintiffs represent a class which includes all persons who have purchased used airplanes, motor vehicles and mobile homes and have paid or are required to pay Arkansas' sales or use tax as the result of purchasing such property. Plaintiffs challenge the fact that Arkansas' sales and use taxes are not uniformly applied to all sales and purchases of used airplanes, motor vehicles and mobile homes.[3] More specifically, Plaintiffs maintain that Arkansas' sales and use taxes are applied to sales and purchases of used airplanes, motor vehicles and mobile homes in a manner which discriminates against interstate commerce in violation of the Commerce Clause of the United States Constitution (U.S. Const. Art. I, § 8, Cl.3) and denies them equal protection of the laws of the State of Arkansas ("State") in violation of the Equal Protection Clause of the United States Constitution (U.S. Const., Amend XIV, §1).

Arkansas' sales tax is an excise tax that is levied upon the gross receipts derived from the sale of tangible personal property. *See* Ark. Code Ann. § 26-52-301(1). "The [sales] tax is not levied on the seller or the consumer, but is levied on the transaction, that is the sale itself." *Cook, Commissioner of Revenues v. Sears-Roebuck & Co.*, 212 Ark. 308, 206 S.W.2d 20 (1947). Arkansas' use tax is also an excise tax. The use tax is levied upon "the privilege of storing, using or consuming within this state any article of tangible personal property purchased for storage, use or consumption in this state." Ark. Code Ann. § 26-53-106(a). The sales tax is intended to apply primarily to in-state "sales" and the

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[3] Except as otherwise noted, the term "sales" is used herein to refer to sales of tangible personal property that are completed within the State of Arkansas and would be subject to Arkansas' sales tax unless an exemption applies; the term "purchases" is used herein to refer to purchases of tangible personal property in other states "for use" in Arkansas which would be subject to Arkansas' use tax unless an exemption applies. *See* Ark. Code Ann. §§ 26-52-103(a)(3) and 26-53-102(5).

use tax is intended to apply primarily to "purchases" of property in other states "for use" in Arkansas. *See Morley v. E. E. Barber Construction Co.*, 220 Ark. 485, 248 S.W.2d 689 (1952). H. David Blair, *Compensating Use Taxes: Past and Present Constitutional Problems in Imposition and Collection*, 18 Ark. L. Rev. 320 (1965). The risk that both the sales tax and the use tax would be levied when a consumer purchases property in Arkansas for use in Arkansas is eliminated by Arkansas Code Ann. § 26-53-112(2) which exempts transactions from the use tax whenever the sales tax is applicable.

When uniformly applied, Arkansas' sales and use taxes may be applied each and every time an item of tangible personal property is sold in Arkansas or purchased "for use" in Arkansas regardless of whether Arkansas or any other state taxed a prior transaction involving such property. Each transaction is a completely separate taxable event. Notwithstanding this fact, the Arkansas Legislature has elected to exempt sales and purchases of used airplanes, motor vehicles and mobile homes from Arkansas' sales and use taxes if Arkansas taxed any prior transaction involving the same property item. *See* Ark. Code Ann. §§ 26-52-504, 26-52-505, 26-52-510, 26-53-126 and 26-53-112(2). Furthermore, sales and purchases of used motor vehicles and mobile homes (not airplanes) are exempted from Arkansas' sales and use taxes if such property has previously been registered with the Arkansas Department of Motor Vehicles.[4]

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[4] Motor vehicles and mobile homes are required to be registered with the Arkansas Department of Motor Vehicles pursuant to the provisions of Ark. Code Ann. § 27-14-701 et. seq. The act of moving to Arkansas is not a taxable event, therefore, neither the Arkansas sales tax nor the Arkansas use tax is applicable if a person moves to Arkansas and re-registers their motor vehicle or their mobile home. Motor vehicles and mobile homes which have been re-registered in Arkansas may be sold tax free regardless of whether or not Arkansas taxed a prior transaction involving the particular property item. *See* Ark. Code Ann. §§ 26-52-510(b)(2), 26-52-504(b), 26-52-504(c), 26-53-126(3) and 26-53-112(2).

II.

"It long has been established that the Commerce Clause of its own force protects free trade among the states." *Armco, Inc. v. Hardesty*, 467 U.S. 638, 642, 104 S.Ct. 2620, 2622, 81 L.Ed.2d 540 (1984); *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 97 S.Ct. 599, 606, 50 L.Ed.2d 514 (1977); *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 403, 104 S.Ct. 1856, 1865, 80 L.Ed.2d 388 (1984). "One aspect of this protection is that a state may not discriminate between transactions on the basis of some interstate element." *Armco, Inc., supra*; *Tyler Pipe Industries, Inc. v. Washington Dept. of Revenue*, 483 U.S. 232, 107 S.Ct. 2810, 2816, 97 L.Ed.2d 199, (1987); *American Trucking Assns., Inc. v. Scheiner*, 483 U.S. 266, 107 S.Ct. 2829, 2838-2839, 97 L.Ed.2d 226 (1987); *Boston Stock Exchange v. State Tax Comm'n, supra*, 429 U.S. at, 332, 97 S.Ct. at, 608, n.12.

"No state, consistent with the Commerce Clause, may impose a tax which discriminates against interstate commerce by providing a direct commercial advantage to local business." *Boston Stock Exchange, supra*, 429 U.S. at, 329, 97 S.Ct. at, 607, 50 L.Ed.2d 514 (1977); *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 83 S.Ct. 1201, 10 L.Ed.2d 202 (1963); *Henneford v. Silas Mason Co., Inc.*, 300 U.S. 577, 57 S.Ct. 524, 81 L.Ed. 814 (1937). *Washington Electric Corp. v. Tully, supra*, 104 S.Ct. at, 1865; *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S.Ct. 3049, 3054, 82 L.Ed.2d 200 (1984).

In cases such as this it is the duty of this Court "to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce. This concern with the actuality of operation, a dominant theme running through all state taxation cases, extends to every aspect of the tax operations." *Halliburton Oil Well Cementing Co. v. Reily, supra*, 373 U.S. at, 69, 83 S.Ct. at, 1203, 10 L.Ed.2d 202 (1963); *Maryland v. Louisiana*, 451 U.S. 725, 101 S.Ct. 2114, 2134, 68 L.Ed.2d 576 (1981); *Best & Co., Inc. v. Maxwell*, 311

U.S. 454, 455-456, 61 S.Ct. at, 335, 85 L.Ed. 275 (1940).

The Supreme Court's decision in *Halliburton Oil Well Cementing Co. v. Reily, supra*, is particularly applicable to this case. In *Halliburton*, the Supreme Court held that Louisiana's use tax unconstitutionally discriminated against interstate commerce. Louisiana had levied its use tax upon Halliburton Oil Well Cementing Co. when it purchased a used airplane out-of-state for use in Louisiana. Louisiana's tax scheme contained an "isolated sales" exemption that would have applied if Halliburton had purchased the used airplane from a similarly situated seller in Louisiana. In reaching the conclusion that Louisiana's tax scheme unconstitutionally discriminated against interstate commerce the Court stated as follows:

> As the facts of this case indicated, isolated sales involve primarily the acquisition of second-hand equipment from previous users. The effect of the tax is to favor local users who wish to dispose of equipment over out-of-state users similarly situated. What ever the Louisiana Legislature's reasons for granting such an exemption to this segment of the local second-hand market, no attempt has been made to justify it or to show how its purpose would be defeated by extending the same exemption to similar out-of-state transactions. We therefore conclude that the use tax on isolated sales in this case departs from the equality required by *Silas Mason* and discriminates against interstate commerce. *Supra*, 373 U.S. at, 73-74, 83 S.Ct. at, 1206. (emphasis added)

Thus, the Supreme Court rejected Louisiana's argument that its discriminatory tax scheme was justified by the fact "that any item sold in a local isolated sale [had] already been subjected to either a sales tax if it was originally acquired in Louisiana or a use tax if it was imported, whereas there [was] no assurance that an item acquired in an out-of-state isolated sale [had] ever sustained such a

tax burden." *Supra*, 373 U.S. at, 73-74 n.8, 83 S.Ct. at, 1206 n.8. The Arkansas Legislature has incorporated the same faulty reasoning into Arkansas' tax scheme by conditioning the applicability of the exemptions for used airplanes, motor vehicles and mobile homes upon the distinction of whether Arkansas taxed a prior transaction involving a particular property item. *See* Ark. Code Ann. §§ 26-52-504, 26-52-505, 26-52-510, 26-53-126 and 26-53-112(2).

The effect of Arkansas' sales and use tax scheme is to favor Arkansans who wish to dispose of their used property over similarly situated residents of other states who wish to dispose of the same types of used property. Sales and purchases of used airplanes, motor vehicles and mobile home are exempted from Arkansas' sales and use taxes if Arkansas taxed a prior transaction involving the particular property item. Arkansas' sales or use tax would have been applied when Arkansans acquired their property for use in Arkansas, unless such property was already exempt, therefore, Arkansans generally may resell their used property tax free. Furthermore, people who move to Arkansas and re-register their motor vehicles and mobile homes with the Arkansas Department of Motor Vehicles may also resell such property tax free.[5]

On the other hand, the exemptions generally do not apply when used airplanes, motor vehicles and mobile homes are sold by similarly situated residents of other states because neither Arkansas' sales tax nor Arkansas' use tax would have previously been applied when they acquired their property for use in their home states. Arkansas' sales tax is applied if these persons bring their property into Arkansas and resell it to an Arkansas consumer. Arkansas' use tax is applied if an Arkansas consumer purchases such property in another state for use in Arkansas. The discriminatory affect upon interstate commerce is the same regardless of whether the sales tax or the use tax is applied to a transaction.

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[5] *See* footnote 4.

Arkansas' sales and use tax scheme forecloses tax neutral decision making by consumers who purchase used airplanes, motor vehicles and mobile homes and exerts hydraulic pressure on consumers to purchase used airplanes, motor vehicles and mobile homes which will qualify for the exemptions. A nondiscriminatory sales and use tax scheme would permit consumers to choose which used airplane, motor vehicle or mobile home they purchase without regard to the tax consequences. A nondiscriminatory sales and use tax scheme would uniformly tax or exempt all sales and purchases of used airplanes, motor vehicles and mobile homes without regard to whether Arkansas or some other state previously taxed a prior transaction and without regard to whether a motor vehicle or mobile home had previously been registered in Arkansas.

The Supreme Court has stated in its more recent decisions that a "tax must have what might be called internal consistency - that is, the tax must be such that, if applied by every jurisdiction, there would be no impermissible interference with free trade." *Tyler Pipe Industries, Inc., supra*, 483 U.S. 232, 107 S.Ct. at, 2820, 97 L.Ed.2d 199 (1987); *American Trucking Associations, Inc., supra*, 483 U.S. 266, 107 S.Ct. at, 2840, 97 L.Ed.2d 226 (1987); *Armco, Inc., supra*, 467 U.S. at, 644-645, 104 S.Ct. at, 2623-2624, 81 L.Ed.2d 540 (1984); *Container Corp. of American v. Franchise Tax Board*, 463 U.S. 159, 163, 103 S.Ct. at, 2939, 77 L.Ed.2d 545 (1983). If every state were to adopt Arkansas' sales and use tax scheme the taxability of sales and purchases of used airplanes, motor vehicles and mobile homes would depend upon which states had taxed prior transactions involving such property. The taxability of sales and purchases of used motor vehicles and mobile homes would also depend upon which states the property had previously been registered in. Such a tax scheme would place impermissible barriers on the free flow of trade among the states. A nondiscriminatory sales and use tax scheme would uniformly tax or exempt all sales and purchases of used airplanes, motor vehicles and mobile homes regardless of which states had taxed prior transactions involving such property and regardless of which states

motor vehicles and mobile homes had previously been registered in. Arkansas' sales and use tax scheme is not "internally consistent."

Arkansas' sales and use taxes are applied to sales and purchases of used airplanes, motor vehicles and mobile homes in a manner which discriminates against interstate commerce in violation of the Commerce Clause of the United States Constitution.

III.

Plaintiffs' Equal Protection argument challenges the fact that some sales and purchases of used airplanes, motor vehicles and mobile homes are taxed while others are exempted from taxation. As a threshold matter, the Commissioner argues that the difference in taxation "is not discrimination but it is ... an exercise by the State of Arkansas of restraint in the exercise of its taxing power." (Commissioner's Trial Brief p.19) This argument is apparently based upon the faulty reasoning that if the State has the power to levy a particular tax then it may selectively refrain from exercising its power by exempting any person, transaction or event from the tax without running afoul of the Constitution. The Commissioner's argument, if accepted, "would effectively insulate underinclusive [tax schemes] from constitutional challenge, a proposition" the Supreme Court has soundly rejected. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 107 S.Ct., at, 1726, 95 L.Ed.2d 209 (1987); *see also WHYY, Inc. v. Glassboro*, 393 U.S. 117, 89 S.Ct. 286, 21 L.Ed.2d 242 (1968); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 105 S.Ct. 2862, 86 L.Ed.2d 487 (1985); *Williams v. Vermont*, 472 U.S. 14, 105 S.Ct. 2465, 86 L.Ed.2d 11 (1985); *Texas Monthly, Inc. v. Bullock*, ____ U.S. ____, 109 S.Ct. 890, 103 L.Ed.2d (1989); *Davis v. Michigan Dept. of Treasury*, ___ U.S. ___, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989). The distinctions which the Arkansas Legislature has made in determining which sales and purchases of used airplanes, motor vehicles and mobiles homes are taxed or exempted must pass constitutional muster and can not be justified as a mere "exercise by the State of Arkansas of restraint in the exercise of its taxing power" as

suggested by the Commissioner.

Statutes adopted by the Arkansas Legislature are presumed to be constitutional. *See Streight v. Ragland*, 280 Ark. 206, 655 S.W.2d 459 (1983); *Owen v. Dalton*, 296 Ark. 351, 757 S.W.2d 921 (1988). Arkansas' sales and use tax scheme will "be sustained if the legislature could have reasonably concluded that the challenged classification[s] would promote a legitimate state purpose." *Williams v. Vermont, supra*, 105 S.Ct. at, 2472 (1985).

Plaintiffs challenge the fact that the Arkansas Legislature restricted the applicability of the exemptions for used airplanes, motor vehicles and mobiles homes based upon the distinctions of whether Arkansas taxed a prior transaction involving a particular property item and whether motor vehicles and mobile homes were previously registered in Arkansas. The constitutional analysis of the Plaintiffs' arguments requires that the Court first determine whether the Arkansas Legislature could have rationally concluded that it would promote a legitimate state purpose by restricting the applicability of the exemptions based upon the distinction of whether or not a tax was imposed on a prior transaction by any state. If the Legislature could have rationally reached this conclusion, then the Court must determine whether the Arkansas Legislature could have rationally concluded that it would promote a legitimate state purpose by restricting the applicability of the exemptions based upon the distinction of whether Arkansas levied a tax on a prior transaction. Finally, the Court must determine whether the Arkansas Legislature could have rationally concluded that it would promote a legitimate state purpose by restricting the applicability of the exemptions based upon the distinction of whether motor vehicles and mobile homes were previously registered in Arkansas.

The Commissioner has advanced the following arguments that the challenged classifications are rationally related to the promotion of a legitimate state purpose:

In the *Silas Mason* case the United States Supreme Court

> stated the obvious justification for any system of credits in the passage cited above in this brief (57 S.Ct. at, 529). That justification is relief of unnecessary oppression resulting from the tax system.
>
> Other justification for this exercise in restraint might include the fact that there are many poor people in Arkansas and that there is very little in the way of public transportation. Since poor people must depend upon used vehicles for transportation and mobile homes for shelter, the legislature has determined it is proper to lessen the burden on lower income residents by subjecting used mobile homes and motor vehicles to tax only once. As to the exemption for used airplanes, Arkansas has passed many credits and incentives for business. *See* for example Ark. Code Ann. § 26-52-402 (1987) which grants an exemption for certain machinery and equipment from sales tax for manufacturers. *See also*, Ark. Code Ann. § 26-52-405 (1987) which exempts sales of products used for livestock and poultry. Since many businesses require interstate travel, the legislature may have conceived that by lessening the burden on used aircraft Arkansas businesses would be more able to compete with other businesses and therefore granted an exemption. (Commissioner's Trial Brief p. 19-20)

The Commissioner's arguments suggest that applying Arkansas' sales or use tax to a transaction would be oppressive if a tax was levied on a prior transaction involving the same property item. Arkansas' sales and use taxes are excise taxes and each transaction is a completely separate taxable event. Arkansas' sales or use tax may be levied each and every time tangible personal property is sold in Arkansas or purchased for use in Arkansas regardless of whether taxes were levied on prior transactions by Arkansas and forty-nine other states. It would be fundamentally inconsistent with these principles to conclude that uniformly applying Arkansas' sales and use taxes to all sales and purchases of used airplanes, motor

vehicles and mobile homes would constitute an oppressive tax burden solely because a tax was levied on a prior transaction. To hold otherwise would raise the issue of why did the Arkansas Legislature exempt sales and purchases of certain types of used property and not exempt all types of tangible personal property whenever a tax was levied on a prior transaction. Therefore, the Court concludes that the Arkansas Legislature could not have rationally concluded that it would promote a legitimate state purpose by restricting the applicability of exemptions based upon the distinction of whether a tax was levied on a prior transaction.

The Commissioner's argument also fails the second part of the constitutional analysis which focuses upon the issue of whether the Arkansas Legislature could have rationally concluded that it would promote a legitimate state purpose by restricting the applicability of the exemptions upon the distinction of whether Arkansas taxed a prior transaction. Arkansas' sales and use taxes would be no less oppressive if another state had taxed a prior transaction involving a particular property item than it would be if Arkansas had taxed a prior transaction.

As for the Commissioner's arguments regarding the stated purposes of helping poor people purchase used motor vehicles for transportation and mobile homes for shelter and helping businesses purchase used airplanes, the issue is not whether the Arkansas Legislature could have rationally concluded that it would promote such stated purposes by exempting all sales and purchases of used airplanes, motor vehicles and mobile homes; rather, the issue is whether the Arkansas Legislature could have rationally concluded that it would promote such purposes by restricting the applicability of the exemptions based upon the distinctions of whether Arkansas taxed a prior transaction or whether motor vehicles and mobile homes were previously registered in Arkansas. The obvious effect of placing such restrictions on the applicability of the exemptions is to limit the number of used airplanes, motor vehicles and mobile homes available to be purchased by consumers tax free, thus defeating, the stated purposes of helping consumers purchase used

airplanes, motor vehicles and mobile homes. These stated purposes would have been better served by exempting all sales and purchases of used airplanes, motor vehicles and mobile homes. Therefore, the Arkansas Legislature could not have rationally concluded that it would promote the stated purposes of helping poor people purchase used motor vehicles for transportation and mobile homes for shelter and businesses purchase used airplanes by restricting the applicability of the exemptions based upon the distinctions of whether Arkansas taxed a prior transaction or whether motor vehicles and mobile homes were previously registered in Arkansas.

In conclusion, no legitimate state purpose is promoted by the discriminatory manner which Arkansas' sales and use taxes are applied to transactions involving used airplanes, motor vehicles and mobile homes. Therefore, Arkansas' tax scheme denies the sellers and the purchasers of used airplanes, motor vehicles and mobile homes equal protection of the laws of the State of Arkansas in violation of the Equal Protection Clause of the United States Constitution.

IV.

Pursuant to an Order previously issued by this Court the parties have submitted separate briefs specifically addressing the remedy issues raised by this case. The parties have requested that the Court render a decision on the remedy issues based upon the arguments made at previous hearings and the pleadings, motions and briefs filed with the Court.

Plaintiffs have requested that the Court order the Defendants to refund the taxes they have paid and enjoin the Commissioner from collecting sales and use taxes with respect to sales and purchases of used airplanes, motor vehicles and mobile homes. The Commissioner argues that even if Arkansas' sales and use tax scheme has unconstitutionally discriminated against interstate commerce or denied the Plaintiffs equal protection of the law the Court should apply its ruling prospectively by striking the

exemptions for used airplanes, motor vehicles and mobile homes and by refusing to order a refund of the taxes the Plaintiffs have paid.

The Supreme Court has rejected similar arguments in finding that taxpayers have standing to challenge underinclusive tax schemes reasoning that allowing prospective relief only "would not relieve the harm inflicted during the time" period taxpayers were subjected to the unconstitutional tax burden. *Bacchus Imports, Ltd., et al. v. Dias, Director of Taxation of State of Hawaii*, 468 U.S. 263, 104 S.Ct. 3049, 3054 n.7, 82 L.Ed.2d 200 (1984). *See Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987); and *Texas Monthly, Inc. v. Bullock*, ___ U.S. ___, 109 S.Ct. 890, 103 L.Ed.2d 1 (1989). Such reasoning is applicable to the case at bar. Declaring the exemptions for used airplanes, motor vehicles and mobile homes invalid prospectively, as suggested by the Commissioner, would "stand as a total bar to [Plaintiffs'] relief" for the unconstitutional taxes they have already paid. *Arkansas Writers' Project, Inc. v. Ragland, supra*, 107 S.Ct. at, 1726; *Orr v. Orr*, 440 U.S. 268, 272, 99 S.Ct. 1102, 1108, 59 L.Ed.2d 306 (1979). Furthermore, declaring the exemptions invalid prospectively would judicially expand Arkansas' sales and use taxes to transactions which the Arkansas Legislature has specifically expressed its intent not to tax.[6] The Arkansas Legislature will be free to repeal any of the exemptions prospectively if it so desires.

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[6] The following cases from other jurisdictions have denied similar requests for courts to extend the coverage of a state tax or state regulation, to previously exempted or excluded entities, as opposed to striking the offending tax or regulation. *See Dow Jones & Co., Inc. v. Oklahoma Tax Comm.*, 1990 WL 5835 (OK., January 30, 1990); *In Matter of McGraw-Hill, Inc. v. State Tax Comm.*, 1990 WL 14205 (N.Y., February 20, 1990); *Commercial National Bank of Chicago v. City of Chicago*, 432 N.E.2d 227 (Ill. 1982); *Simpson v. State of Washington*, 615 P.2d 1297 (Ct. App. Wash. 2nd Div. 1980); *Comptroller of Treas. v. Pittsburgh-Des Moines Steel Co.*, 189 A.2d 107 (Ct. App. Md. 1963); *State v. Indland Empire Refineries, Inc.*, 101 P.2d 975 (Wash. 1940); *American Youth Foundation v. Township of Benona*, 195 N.W.2d 304 (Ct. App. Mich. 3rd Div. 1972); *State v. Bates*, 224 S.W.2d 996 (Mo. 1949); and *Eliasberg Bros. Mercantile Co. v. Grimes*, 86 So. 56 (Ala. 1920).

Therefore, the Court declines the Commissioner's invitation to strike the exemptions for used airplanes, motor vehicles and mobile homes.

The Plaintiffs are entitled to a refund of the sales and use taxes they have paid. Ark. Code Ann. § 26-18-507 provides:

> Any taxpayer who has paid any state tax to the State of Arkansas, through error of fact, computation, or mistake of law, in excess of the taxes lawfully due shall, subject to the requirements of this chapter, be refunded the overpayment of the tax determined by the director to be erroneously paid upon the filing of an amended return or a verified claim for refund.

The taxpayers represented by this class action suit have paid sales and use taxes to the State of Arkansas "in excess of taxes lawfully due" in connection with sales and purchases of used airplanes, motor vehicles and mobile homes. They are entitled to a refund of such taxes, plus interest thereon pursuant to Ark. Code Ann. § 26-18-508, provided that the statute of limitations contained in § 26-18-306(i) had not barred their rights to a refund prior to the filing of this suit on their behalf.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED by the Court as follows:

(1) Arkansas' sales and use taxes are applied to sales and purchases of used airplanes, motor vehicles and mobile homes in a manner which discriminates against interstate commerce in violation of the Commerce Clause of the United States Constitution and denies the sellers and the purchasers of such property equal protection of the laws of the State of Arkansas.

(2) Defendant Jim C. Pledger and the Arkansas Department of Finance and Administration is enjoined from collecting Arkansas' sales and use taxes and all local sales and use

taxes with respect to sales and purchases of used airplanes, motor vehicles and mobile homes.

(3) Defendant Jim C. Pledger, Director of the Arkansas Department of Finance and Administration and Defendant Jimmie Lou Fisher, Treasurer of the State of Arkansas are hereby ordered to account for and refund the sales and use taxes paid by the taxpayers represented by this class action suit to the extent such taxes have been collected in excess of that lawfully due as determined hereinabove, plus interest thereon pursuant to Ark. Code Ann. § 26-18-508, provided that the statute of limitations contained in § 26-18-306(i) had not barred their rights to a refund prior to the filing of this suit on their behalf. Defendant Jim C. Pledger is ordered to submit to the Court within thirty (30) days a plan for providing notice to the taxpayers represented by this class action suit of their rights to a refund and establishing procedures, forms, and instructions to be used in implementing such refunds in an orderly fashion.

(4) "[W]hen a class action results in the recovery of a 'common fund' it is proper to allow attorneys' fees to be paid from the fund." *American Trucking Association v. Gray*, 295 Ark. 43, 47 (1988); *Powell v. Henry*, 267 Ark. 484 (1980); and *Marlin v. Marsh*, 189 Ark. 1157 (1934). Counsel for the Plaintiffs shall be apportioned and awarded a reasonable part of the common fund held subject to refund as compensation for professional services performed and for reimbursement of costs expended.

(5) The Court retains jurisdiction of this cause for the purpose of ascertaining and enforcing all rights and obligations of the parties under this Order, and for other proper relief.

DATED this 23rd day of April, 1990.

/s/ LEE A. MUNSON, Chancellor

APPENDIX C

STATUTORY PROVISIONS INVOLVED

Ark. Code Ann. § 26-5-101 (1987) provides in pertinent part:

> "Each purchaser liable for a use tax on tangible personal property shall be entitled to full credit for the combined amount or amounts of legally imposed sales or use taxes paid by him with respect to the same property to another state and any subdivision thereof. The credit shall be applied first against the amount of any use tax due the state, and any unused portion of the credit shall then be applied against the amount of any use tax due a subdivision."

Ark. Code Ann. § 26-52-301 (1987) provides in pertinent part:

> "There is levied an excise tax of three percent (3%) upon the gross proceeds or gross receipts derived from all sales to any person of the following:
> (1) Tangible personal property..."

Ark. Code Ann. § 26-52-302 (1987) provides in pertinent part:

> "In addition to the excise tax levied upon the gross proceeds or gross receipts derived from all sales by the Arkansas Gross Receipts Act, § 26-52-101 et seq., there is levied an excise tax of one percent (1%) upon all taxable sales of property and services subject to the tax levied in that act. This tax shall be collected, reported, and paid in the same manner and at the same time as is prescribed by law for the collection, reporting, and payment of all other Arkansas gross receipts taxes. In computing gross receipts or gross proceeds as defined in § 26-52-103(a)(4), a deduction shall be allowed for bad debts resulting from the sale of tangible personal

property."

Ark. Code Ann. § 26-52-504 (1987) provides in pertinent part:

> "...(b) This section shall apply equally to used house trailers or mobile homes except in instances where the used house trailer or mobile home has once been subjected to the gross receipts tax on a previous sale and reported by the seller or dealer and in instances where the original purchaser has paid the Arkansas compensating tax to a registered out-of-state dealer or directly to the director as provided under the Arkansas Compensating Tax Act, § 26-53-101 et seq.
>
> (c) It is the intent of this section that used house trailers or mobile homes once having been subjected to either the gross receipts or compensating tax shall on subsequent sale be exempted."

Ark. Code Ann. § 26-52-505 (1987) provides in pertinent part:

> "...(b)(1) This section shall apply equally to used aircraft, except in instances where the used aircraft has once been subjected to the gross receipts tax on a previous sale and reported by the seller or dealer and in instances where the original purchaser has paid the Arkansas compensating tax to a registered out-of-state dealer or directly to the director as provided under the Arkansas Compensating Tax Act, § 26-53-101 et seq.
>
> (2) It is the intent of this section that used aircraft once having been subjected to either the gross receipts or compensating tax, on subsequent sale shall be exempted."

Ark. Code Ann. § 26-52-510 (1987) provides in pertinent part:

> "...(a)(2) It is the intent of this subsection to exempt

those used automobiles which have once been subjected to the tax levied under this act as evidenced by previous registration in the State of Arkansas...

(c) The provisions of this section shall apply equally to all motor vehicles, trailers, and semitrailers required to be licensed under the laws of the State of Arkansas."

Ark. Code Ann. § 26-53-106 (1987) provides in pertinent part:

"(a) There is levied and there shall be collected from every person in this state a tax or excise for the privilege of storing, using, or consuming within this state any article of tangible personal property purchased for storage, use, or consumption in this state at the rate of three percent (3%) of the sales price of the property."

Ark. Code Ann. § 26-53-107 (1987) provides in pertinent part:

"In addition to the excise tax levied upon the privilege of storing, using, or consuming tangible personal property within this state by the Arkansas Compensating Tax Act, § 26-53-101 et seq., there is levied an excise tax of one percent (1%) upon all tangible personal property subject to the tax levied in that act, and the tax shall be collected, reported, and paid in the same manner and at the same time as is prescribed by law for the collection, reporting, and payment of state compensating taxes."

Ark. Code Ann. § 26-53-112 (1987) provides in pertinent part:

"There is specifically exempted from the taxes levied in this subchapter:

...(2) Sales of tangible personal property on which the tax under the Arkansas Gross Receipts Act, § 26-52-101 et seq., is levied, and any tangible personal property

specifically exempted from taxation by the Arkansas Gross Receipts Act, § 26-52-101 et seq., and legislation enacted subsequent thereto."

Ark. Code Ann. § 26-53-126 (1987) provides in pertinent part:

"(a) All used cars shall, upon being registered in this state for the first time, be subject to the tax levied herein irrespective of whether such car was purchased from a dealer or an individual.

(b)(1) The tax levied upon used cars shall be paid by the person making application to register the car to the director instead of being collected by the dealer or individual seller.

(2) It shall be the mandatory duty of the director to collect the tax before issuing a license for any such used car, except those cars upon which the tax levied under this subchapter or the Arkansas Gross Receipts Act, § 26-52-101 et seq., has once been paid by the original purchaser or subsequent purchaser.

(3) It is the intention of this section to exempt those used cars which have once been subjected to the tax herein levied or the tax levied by the Arkansas Gross Receipts Act, § 26-52-101 et seq., as evidenced by previous registration in this state.

(c) However, the tax created by this subchapter shall not apply to a motor vehicle to be registered by a bona fide nonresident of this state.

(d) The terms "used car" or "car" as used in this section means any motor vehicle, trailer, or semitrailer required to be licensed under the laws of this state.

(e)(1) It is the intent and purpose of this section to require that either the gross receipts tax levied by the Arkansas Gross Receipts Act, § 26-52-101 et seq., or the compensating tax levied by the Arkansas Compensating Tax Act, § 26-53-101 et seq., be paid upon every used car, except those cars upon which either the state gross receipts tax or the state compensating tax has once been paid as evidenced by previous registration in this state, irrespective of whether the car was purchased from a dealer or from an individual.

(2) It is further intended that the tax shall be paid by the person making application to register such car to the director at the time of making application for registration of the car in this state for the first time.

(f) Nothing in this section shall be construed to repeal any exemption from the Arkansas Compensating Tax Act."

No. 91-1943 (2)

Supreme Court, U.S.
FILED
JUL 1 1992
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

BRUNNER & LAY, INC., ROBERT M. WILKINSON, AND BOBBY AND GEORGIA MCLAUGHLIN ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED TAXPAYERS, ... *Petitioners,*

VS.

JIM C. PLEDGER, COMMISSIONER OF REVENUES; JIMMIELOU FISHER, TREASURER OF THE STATE OF ARKANSAS; JOAN R. PERRY, TREASURER OF WASHINGTON COUNTY; AND CHARLES A. JOHNSON, COUNTY JUDGE OF WASHINGTON COUNTY, ARKANSAS,..... *Respondents.*

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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No. 92-1943

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

BRUNNER & LAY, INC., ROBERT M. WILKINSON, AND BOBBY AND GEORGIA MCLAUGHLIN ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED TAXPAYERS, ... *Petitioners,*

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

Respondents respectfully request that this Court deny Petitioners' petition for writ of certiorari seeking review of the opinion of the Arkansas Supreme Court.

REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE ARKANSAS SUPREME COURT DOES NOT CONFLICT WITH ANY DECISIONS OF THIS COURT.

Since 1977, the question of whether a state tax violates the Commerce Clause has been determined by applying the four-part test of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). A tax survives a Commerce Clause challenge if it "[1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State." *Id.* at 279.[1]

The only real issue before the Arkansas Supreme Court was the application of the third prong of *Complete Auto* to Arkansas' sales and use tax on used vehicles, airplanes, and mobile homes. The Arkansas Supreme Court found the first and fourth prongs satisfied and noted that the Petitioners did not argue that there were insufficient contacts with Arkansas. The court also determined that the second prong was met citing *D. H. Holmes Co. Ltd. v. McNamara*, 486 U.S. 24 (1988) for the proposition that when credit for sales tax paid to another state on a purchase is applied against use tax assessed on the same purchase, the use tax is fairly apportioned. *See* (Pet. App. A at 15a.)

The questions presented by Petitioners focus only on whether Arkansas' sales and use tax scheme discriminates, either facially or in practical effect, against interstate

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[1]This test was most recently applied in *Quill Corp. v. North Dakota*, 60 U.S.L.W. 4423 (U.S. May 26, 1992).

commerce. While there is no model case in the "quagmire"[2] of Commerce Clause opinions, a basic tenet is that a state may not impose "a heavier tax burden on out-of-state business that competes in an interstate market than it imposes on its own residents who also engage in commerce among states." *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 282 (1987).

A. *Facial Discrimination*

A statute is facially discriminatory when there is an "explicit discriminatory design to the tax"[3] or when by its terms it treats unequally people inside and outside of the state.[4] Petitioners undermine their facial discrimination claim by agreeing that the "statute does not by its terms favor the Arkansas over the out-of-state purchase." (Pet. at 11.)

The recent cases cited by Petitioners in support of facial discrimination (Pet. at 9-10) concern statutes which conferred a tax benefit based either on the source of the goods[5] or the site of the taxpayer's activities.[6] None of these cases conflicts with the Arkansas Supreme Court's conclusion that the challenged exemptions were valid because they "did *not*

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[2]*Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959).

[3]*Amerada Hess v. New Jersey Taxation Div.*, 490 U.S. 66, n.6 (1989).

[4]Michael E. Smith, *State Discrimination Against Interstate Commerce*, 74 Cal. L. Rev. 1203 (1986).

[5]*New Energy Co. of Indiana v. Limbach*, 486 U.S. 269 (1988); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). *Bacchus* is not a "facial discrimination" case but a "discriminatory intent" case. *Amerada Hess*, 490 U.S. at 76.

[6]*Tyler Pipe Indus., Inc. v. Washington St. Dept. of Rev.*, 483 U.S. 232 (1987); *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984); *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984); *Maryland v. Louisiana*, 451 U.S. 725 (1981); *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977).

depend on the residency of either the seller or the buyer, or on the location, in or out of this state, of the sale or purchase transaction." (Pet. App. A at 15a.) Clearly, the Arkansas statutes treated in-state purchases of used goods equally with out-of-state purchases with the tax burden in both cases being borne by the Arkansas resident.[7]

Recent Commerce Clause cases generally focus on the facts of the taxpayer's taxable activity and whether the same activity, if undertaken by another person, is taxed differently because of some "interstate element." *See Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 332 n.12 (1977) and cases cited herein at note 4. The Arkansas sales and use tax scheme exempted the sale or purchase of used vehicles, airplanes, and mobile homes previously taxed by Arkansas. The narrow question in this case is whether the used item's sale history has any relevance in a Commerce Clause analysis. Petitioners have failed to cite any case which even by the most liberal analogy would extend Commerce Clause protection based on the *past* relationship of the used item with interstate commerce.

Previous decisions of this Court establish that neither the past commercial history[8] nor the post-sale destination of goods[9] is relevant in determining whether a sales or use tax on

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[7]This Court has suggested that tax burdens falling on resident taxpayers may not come within Commerce Clause protection. *Goldberg v. Sweet*, 488 U.S. 252 (1989); *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1959).

[8]*McGoldrick v. Berwind-White Coal Min. Co.*, 309 U.S. 33 (1940). Sales tax on coal shipped from outside the state into New York did not burden interstate commerce.

[9]*Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981). A state severance tax on coal did not discriminate against commerce even though 90% of the coal was shipped out of state for use by non-residents. The tax was calculated at the same rate regardless of the final destination.

sales of those goods is a burden on interstate commerce.

> This Court has indicated that states have considerable latitude in imposing general revenue taxes. . . . There is no reason to suppose that this latitude afforded the States under the Due Process Clause is somehow divested by the Commerce Clause merely because the taxed activity has some connection to interstate commerce, particularly when the tax is levied on an activity conducted within the state. . . . *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 622-623 (1981).

B. *Discrimination by Practical Effect*

The foundation of Petitioners' "practical effect" discrimination claim rests on a mischaracterization of the record. There is no evidence to establish that, in the "overwhelming majority of cases," used goods purchased in Arkansas will be exempt on subsequent sale and used items purchased out of state will be taxable. (Pet. at 12.) In reality, families frequently move among the states bringing their used goods with them.[10] Car dealers commonly buy used vehicles from out-of-state wholesalers. Multistate businesses dispose of used vehicles and aircraft. In all of these cases non-exempt used goods may become inventory for an Arkansas seller.

Petitioners rely on the "drummer" cases[11] to overcome

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[10]As certified, the class of taxpayers encompasses those who purchased used vehicles, mobile homes, and airplanes between September, 1986 and April 30, 1991. (The repeal of the challenged exemptions was effective May 1, 1991.) Between 1985 and 1990, 252,836 people (aged 5 years and over) moved from another state to Arkansas. U.S. Department of Commerce, Bureau of Census, Press Release No. CB92-39, 1990 CPH-L-80, Table 1 (May 27, 1992).

[11]Pet. at 12; *See Nippert v. Richmond*, 327 U.S. 416 (1946); *Best & Co. v. Maxwell*, 311 U.S. 454 (1940).

the effect of a bare record. These cases established that a license fee imposed on itinerant salespeople impermissibly burdened interstate commerce. The heavier tax burden "encourages an out-of-state operator to become a resident in order to compete on equal terms." *Halliburton Oil Well Cementing Co. v. Reily*, 374 U.S. 858, n.4 (1963), citing cases contained in *Memphis Steam Laundry Cleaners, Inc. v. Stone*, 342 U.S. 389 (1952). Without any factual basis, Petitioners' assumption cannot be supported by the drummer cases, as even *Nippert*, 327 U.S. 416, is based on an evidentiary record.[12] "Not the tax in a vacuum of words, but its practical consequences for the doing of interstate commerce in applications to concrete facts are our concern." 327 U.S. at 431.

In comparison, *Scheiner*, 483 U.S. 266[13] focused on the *actual* practical effect the Pennsylvania flat tax had on non-resident truckers. The record established that the tax imposed on non-resident truckers was approximately five times as heavy as the cost per mile of local truckers. The effect of the tax was that it favored local business "for no other reason than the location of its business." *Id.* at 286. Unlike *Scheiner*, there is no record here from which the actual practical effect of Arkansas' tax scheme may be analyzed.

In *Amerada Hess v. New Jersey Taxation Div.*, 490 U.S. 66 (1989) this Court determined that New Jersey's add-back provision did not discriminate against interstate commerce and did not exert any pressure on interstate business to

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[12]Ms. Nippert had been in Richmond only five days. There was no indication that she regularly worked in the Richmond area. The license fee was applied to her and others who might only enter Richmond occasionally without regard to business volume or time spent in Richmond. It could be said that the tax was discriminatory because it was also unfairly apportioned.

[13]*Scheiner* is cited in *Amerada Hess*, 490 U.S. at 76 as an example of a state tax which in practical effect discriminates against commerce.

relocate to New Jersey. The Court noted:

> Indeed, precisely because the deduction denial results in a larger New Jersey tax for appellants, it creates some incentive for appellants to move their operations out of that state. Thus, in the absence of discriminatory intent or a statute directed specifically at economic activity that occurs only in a particular location (as in *Bacchus Imports*), a deduction denial does not unduly burden interstate commerce just because the deduction denied relates to an economic activity performed outside the taxing state. *Id.* at 78 n.10.

It has been suggested that unless a negative effect on interstate commerce is established, state statutes which create tax incentives for in-state activities and which do not penalize out-of-state activities do not discriminate against commerce.[14]

Petitioners rely heavily on *Halliburton*, 374 U.S. 858, as the controlling case in "conflict" with the Arkansas Supreme Court. Part of *Halliburton* dealt with the application of Louisiana's use tax to the taxpayer's purchase of used goods in a casual or isolated sale. Louisiana's isolated sale exemption applied to in-state sales but not out-of-state sales. The different tax treatment was dependent *only* on the location of the sale and departed from the rule of equality of *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937).[15] Since Arkansas' tax scheme is not dependent on the location of the sale, *Halliburton* is not applicable.

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[14]Phillip M. Tatarowicz & Rebecca F. Mims-Velarde, *An Analytical Approach to State Tax Discrimination Under the Commerce Clause*, 39 Vand. L. Rev. 879 (1986).

[15]"Equality is the theme that runs through all the sections of the statute. . . . When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates." 300 U.S. at 583-584.

C. *Avoidance of Sequential Taxation*

Petitioners criticize the Arkansas Supreme Court for noting that the "principal object" of Arkansas' tax scheme was to tax only one sale of a vehicle, mobile home, or airplane. (Pet. at 14.) The purpose of the court's comment was to distinguish the present case from *Halliburton* and was not necessarily a basis for upholding the statute against the Commerce Clause challenge. Nevertheless, as this Court noted in *Halliburton*, 374 U.S. 858 n.8:

> The appellee argues that the reason for the exemption is that any item sold in a local isolated sale has already been subjected to either a sales tax if it was originally acquired in Louisiana or a use tax if it was imported, whereas there is no assurance that an item acquired in an out-of-state isolated sale has ever sustained such a tax burden. The appellee further maintains that the taxes here in question could have been reduced by any such previous taxation. *If the record supported the appellee's position, it would be carefully considered.* (emphasis added)

Such a record exists in this case.

D. *Necessity of a Use Tax Credit is Irrelevant.*

Arkansas allows a use tax credit against sales tax paid on a particular purchase.[16] The issue of whether the credit is constitutionally necessary was not before the Arkansas Supreme Court[17] and is not present here.

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[16]Ark. Code Ann. §26-5-101(v) (Michie 1987).

[17]The court speculated that a tax scheme which allowed no use tax credit would be a greater burden on commerce than Arkansas' tax exemption and credit scheme. (Pet. App. A at 16a-17a.)

E. *Arkansas' Tax Scheme is Internally Consistent.*

Although Petitioners' questions presented do not encompass the second prong (fairly apportioned tax)[18] of the *Complete Auto* test, Petitioners assert that Arkansas' tax scheme is not internally consistent. (Pet. at 13 n.11.) Petitioners state that if every state adopted Arkansas' former tax scheme, then used property remaining in a state would be taxed only once while used property purchased out of state would "frequently bear a double tax burden." This interpretation of internal consistency treats Arkansas' tax scheme as a property tax instead of a transactional tax. Provided that a particular transaction is not taxed more than once, there is no risk of multiple taxation and the tax is internally consistent.[19]

II.

THE DECISION OF THE ARKANSAS SUPREME COURT DOES NOT POSE A THREAT TO THE NATIONAL ECONOMY.

The questions presented by Petitioners address the application of well-established Commerce Clause principles to Arkansas' sales and use tax scheme. Allowing the decision of the Arkansas Supreme Court to stand would not disrupt

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[18]The "internal consistency" test originating in *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159 (1983), is part of determining whether a tax is fairly apportioned. *See Goldberg v. Sweet*, 488 U.S. 252, 261 (1989); Walter Hellerstein, *Is "Internal Consistency" Foolish?: Reflections on an Emerging Commerce Clause Restraint on Taxation*, 87 Mich. L. Rev. 138 (1988). A tax is fairly apportioned when there is limited or no risk of multiple taxation on the same transaction. *Goldberg*, 488 U.S. at 261. If all states exempted previously taxed used goods *and* granted a use tax credit, no state would tax a particular sales transaction more than once.

[19]*Goldberg, supra*, note 18; *D. H. Holmes Co., Ltd. v. McNamara*, 486 U.S. 24 (1988).

those principles or affect non-litigants.[20] In support of the asserted national importance of this case, Petitioners reference sales and use tax exemption statutes from other states which, in some fashion, exempt previously taxed used mobile homes and vehicles. (Pet. at 17 n.13-14.) There are only three states whose sales and use tax exemption statutes for used mobile homes are nearly identical to Arkansas'.[21] The rest of the statutes are significantly different.[22]

Petitioners also point to a number of state income tax

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[20]Reversal of the Arkansas Supreme Court would require that court to decide issues it initially declined to address which include: 1) whether the named class representatives have standing; 2) whether the class of taxpayers was properly certified; and 3) whether a tax refund is required under the *Chevron* analysis.

[21]Wyoming and Washington exempt a previously taxed mobile home only if it has become a fixture or improvement to real estate. The effect is that Wyoming and Washington would tax all subsequent sales of used homes which retained the character of tangible personal property. Nevada and Colorado initially tax only a portion of the gross receipts of new manufactured or mobile homes and then exempt subsequent sales. Minnesota taxes all sales of new and used manufactured homes used for commercial purposes; taxes only a portion of the sales price of new manufactured homes used for residential purposes; exempts subsequent sales of used residential manufactured homes; and taxes all sales of mobile homes which do not meet the definition of "manufactured home." Admittedly, the statutes of North Dakota, New Mexico, and Iowa are fairly similar to Arkansas' statutes relating to mobile homes.

The used vehicle exemptions of Connecticut and Michigan are much narrower than Arkansas' statutes. Both states exempt from sales and use tax the transfer of a previously taxed vehicle as the result of a reorganization, organization, or liquidation of a corporation or partnership. All other sales of used vehicles are taxable.

The California vehicle valuation statute appears to be problematic as it imposes a higher tax rate on vehicles purchased from out-of-state sellers than those purchased from in-state sellers. Florida grants a sales or use tax credit against its impact fee on title applications of out-of-state titled vehicles.

[22]*See supra* note 21.

statutes which appear to condition exemptions on the taxpayer's in-state activities. (Pet. at 18 n.17-18.) Petitioners have cited no state court decisions determining the constitutionality of any of these statutes, other than California's valuation statute. (Pet. at 18 n.15.) There appears to be no conflict among these states and this Court requiring resolution.

The effect of reversing the Arkansas Supreme Court would not, as Petitioners state, keep state legislatures from passing burdensome legislation. A reversal would represent a major extension of Commerce Clause protection from accepted interstate elements of residency, geographic location, and source of goods to non-situs factors and could open the door for challenges to many other types of state statutes which have been presumed constitutional in light of past Commerce Clause jurisprudence. One group of statutes offers tax incentives which encourage local economic activity but do not depend on the taxpayer's out-of-state activity.[23] Such a ruling would create grave uncertainty among the states at a time when bolstering local economies is necessary to keep many states financially afloat.

The decision of the Arkansas Supreme Court is neither erroneous nor in conflict with established constitutional principles. Allowing the decision to stand will have no effect on taxing schemes of Arkansas or any other state.

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[23]Tatarowicz, *supra* note 14, at 931 n. 255-258. Such tax incentives include job credits, investment credits, and research credits intended to encourage businesses to locate within the state.

CONCLUSION

For the reasons stated above, this Court should deny Petitioners' petition for writ of certiorari filed herein.

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No. 91-1943

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

BRUNNER & LAY, INC., ROBERT M. WILKINSON, AND BOBBY AND GEORGIA MCLAUGHLIN, on behalf of themselves and all other similarly situated taxpayers,

Petitioners,

v.

JIM C. PLEDGER, COMMISSIONER OF REVENUES; JIMMIE LOU FISHER, TREASURER OF THE STATE OF ARKANSAS; JOAN R. PERRY, TREASURER OF WASHINGTON COUNTY; AND CHARLES A. JOHNSON, COUNTY JUDGE OF WASHINGTON COUNTY, ARKANSAS

Respondents.

Petition for a Writ Of Certiorari to the Supreme Court of Arkansas

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REPLY BRIEF FOR THE PETITIONERS

Respondents make essentially three points in their effort to dissuade this Court from reviewing, or summarily reversing, the decision below. First, they argue that Arkansas' taxing scheme is not facially discriminatory -- even though it explicitly accords preferential tax treatment to property with a previous Arkansas connection -- on the ground that facial discrimination exists only when there is discrimination based on residence, situs, or source. Second, they contend that Arkansas' taxing scheme does not discriminate in effect against interstate commerce -- despite the fact

that used property purchased in Arkansas will more likely have borne a previous Arkansas tax than used property purchased elsewhere -- on the ground that the record fails to support this self-evident proposition. Third, they contend that the case lacks national significance because some of the analogous discriminatory taxing schemes that Petitioners have identified are not identical to Arkansas'. As we demonstrate below, none of these assertions can withstand scrutiny.

I. ARKANSAS' TAXING SCHEME IS FACIALLY DISCRIMINATORY, REGARDLESS OF WHETHER IT DISCRIMINATES ON THE BASIS OF RESIDENCE, SITUS, OR SOURCE

It is indisputable that Arkansas' taxing scheme discriminates on its face against property that lacks a prior connection with Arkansas. The statute by its terms exempts the sale or use of a used car, airplane or mobile home from tax if, but only if, *Arkansas* has taxed an earlier sale or use of the property. Pet. 3-4. Thus, the *only* distinction drawn by the statute between taxable and tax-exempt property is whether the property has a prior connection with Arkansas. Respondents do not -- and could not -- contend otherwise.

Respondents nevertheless claim that such an explicit preference for property with an Arkansas lineage can pass constitutional muster because it does not discriminate on the basis of the residence of the buyer or seller, the situs of the transaction, or the source of the goods. Br. Opp. 3-4. Respondents' claim is frivolous. There is nothing in the Court's long-standing prohibition against taxes that discriminate on their face against interstate commerce to suggest that the prohibition is limited to any particular type of discrimination. To the contrary, the Court's decisions condemn facial discrimination against interstate commerce in any manner, shape, or form. *See, e.g., Best & Co. v. Maxwell*, 311 U.S. 454, 455 (1940) ("[t]he commerce clause forbids discrimination, whether forthright or ingenious").

Indeed, the Court has routinely invalidated as facially discriminatory state taxing schemes like Arkansas', which exempted or favored transactions with local ties, without regard to considerations of residence, situs, or source. *See, e.g., Tyler Pipe Indus., Inc. v. Washington State Dep't of Rev.*, 483 U.S. 232 (1987); *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984); *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977). In *Armco*, for example, the Court struck down West Virginia's wholesaling tax which exempted transactions that had already been subjected to that state's manufacturing tax. The Court held that the Commerce Clause barred the state from according tax preferences to transactions based on whether they had been subjected to a prior levy on in-state activity. For the same reason, Arkansas may not favor transactions involving used property based on whether the property has been the subject of a prior levy on in-state activity. In both *Armco* and in this case, the taxing scheme "forecloses tax-neutral decisions" (*Boston Stock Exchange*, 429 U.S. at 331) and exerts an "inexorable hydraulic pressure" (*American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266, 286 (1987)) on taxpayers to limit their activities to one state in order to minimize their state tax burden. Whether the discrimination is based on residence, situs, source or some other factor is beside the point.

Even if there were a requirement that facial discrimination must be based on residence, situs, or source, Arkansas' levy would satisfy such a requirement. The only used cars, airplanes, or mobile homes that are subject to tax under Arkansas' scheme are those that have not previously been sold or used in Arkansas and, accordingly, such property is properly viewed as having an out-of-state source. On the other hand, used cars, airplanes, or mobile homes that have an Arkansas source, because they were once sold or used in Arkansas, are exempt. Hence Arkansas' taxing scheme is facially discriminatory on the basis of source.

Respondents' assertion that "[p]revious decisions of this Court establish that neither the past commercial history nor the post-sale destination of goods is relevant in determining whether a sales or use tax on sales of those goods is a burden on interstate commerce"

(Br. Opp. 4-5 (footnotes omitted)) likewise lacks substance. In fact, the very first decision of this Court striking down a state tax on the ground that it discriminated against interstate commerce turned on the fact that the tax burdened goods based on their "past commercial history." *Welton v. Missouri*, 91 U.S. 275 (1876) (invalidating a license tax applicable only to goods with "past commercial history" in other states); *see also Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Chemical Waste Management, Inc. v. Hunt*, 60 U.S.L.W. 4433 (U.S., June 1, 1992). Respondents' citation of *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940) and *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981) (Br. Opp. 4) in support of their position reveals the weakness of their claim. Those cases merely held that a *nondiscriminatory* tax, which applied equally to all goods regardless of their origin or destination, was not rendered constitutionally suspect because it applied to goods shipped into or out of the state. The cases hardly support the proposition that a taxing scheme like Arkansas', which explicitly makes tax liability turn on the property's prior in-state connection, can survive constitutional scrutiny.

II. THE RECORD FULLY SUPPORTS PETITIONERS' CLAIM THAT ARKANSAS' TAXING SCHEME DISCRIMINATES IN PRACTICAL EFFECT AGAINST INTERSTATE COMMERCE

Petitioners' "practical effect" argument rests on the self-evident proposition that used cars, airplanes, or mobile homes that are sold in Arkansas will more likely have borne a prior Arkansas sales or use tax than used cars, airplanes, or mobile homes that are sold in other states.[1] Consequently, the practical effect of exempting property that has previously borne an Arkansas sales or use tax is to favor Arkansas sales over out-of-state sales.

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[1]The trial court in substance so found (App. B 25a), and the Arkansas Supreme Court did not reverse on this point. App. A 15a-16a; see also Pet. 6.

Respondents' principal response to this claim is that the record allegedly fails to support it. They argue that Petitioners have not proven that used property purchased in Arkansas is more likely to have borne a previous Arkansas sales or use tax than used property purchased elsewhere. Br. Opp. 5-6. Respondents' position wholly misconceives the import of this Court's decisions invalidating taxes based on their discriminatory practical effect. These decisions turn not on voluminous records documenting the precise impact of a tax but rather on the "inherent character of the tax" (*Nippert v. Richmond*, 327 U.S. 416, 432 (1944)) and the "strong likelihood" that the tax will "bear with undue burden upon commerce that crosses state lines" thereby making "equality of application between [interstate and intrastate] commerce, generally speaking, impossible." *Id.*

Indeed, the record in this case is indistinguishable from the records in the numerous cases in which the Court has struck down taxes on the ground that they discriminate in effect against interstate commerce. For example, in *Nippert*, whose record Respondents cite with approval, Br. Opp. 6, the only facts before the Court were those relating to the activities of Ms. Nippert and other solicitors of the American Garment Company, 327 U.S. at 419-20, along with the statute that taxed itinerant merchants like Ms. Nippert, but not merchants with permanent locations in the city. Here the facts before the Court are those relating to Petitioners' out-of-state purchases of used property, Pet. 4-5, along with the statute that taxes purchasers like Petitioners, but not purchasers of property with a prior Arkansas connection. In each case, the record is more than sufficient for the Court to conclude, as it did in *Nippert*, that, while the tax may strike "as heavily" upon some local transactions as it does upon out-of-state transactions, "the strong likelihood is the other way." 327 U.S. at 432. *See also Real Silk Hosiery Mills v. Portland*, 268 U.S. 325 (1925); *Robbins v. Shelby County Taxing*

District, 120 U.S. 489 (1887).[2] In short, "[w]e need not know how unequal the Tax is before concluding that it unconstitutionally discriminates." *Maryland v. Louisiana*, 451 U.S. 725, 760 (1981).[3]

Respondents further contend that the record in this case is distinguishable from the record in *Halliburton Oil Well Cementing Co. v. Reily*, 374 U.S. 858 (1963), which struck down a Louisiana tax on out-of-state but not in-state "isolated" sales of property for use in Louisiana. Br. Opp. 8. The purported distinction between *Halliburton* and this case is that the record in this case shows that Arkansas' scheme avoids "sequential taxation" whereas the record in *Halliburton* did not. In support of this thesis, Respondents point to the Court's observation in *Halliburton* that Louisiana "maintains that the taxes here in question could have been reduced by any...previous taxation" and that "[i]f the record supported the...position, it would be carefully considered." 373 U.S. at 858 n.8. "Such a record," Respondents contend, "exists in this case." Br. Opp. 8.

Respondents' effort to distinguish *Halliburton* on this ground reveals not only a misunderstanding of the argument in *Halliburton* but also a failure to comprehend the defect in Arkansas' flawed attempt to prevent "sequential taxation." In *Halliburton*, Louisiana

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[2]In both *Real Silk Hosiery* and *Robbins*, which struck down facially neutral taxes on "drummers" on the ground that they discriminated in practical effect against interstate commerce, the only facts before the Court were those relating to the taxpayer's activities, 268 U.S. at 334-35; 120 U.S. at 491-92, along with the statutes that subjected these activities to tax.

[3]Respondents' reliance on *Amerada Hess v. Director, Division of Taxation*, 490 U.S. 66, 78 n.10 (1989), Br. Opp. 6-7, for the proposition that "a deduction denial does not unduly burden interstate commerce just because the deduction denied relates to an economic activity performed outside the taxing state" is misplaced. In the very passage quoted by Respondents, the Court made it clear that this principle had no application when a statute is "directed specifically at economic activity that occurs only in a particular location." 490 U.S. at 78 n.10. That, of course, is the case here, where the statute exempts property from tax because of "economic activity that occurs only in a particular location," namely, the prior sale or use of the property in Arkansas.

defended its isolated sales exemption with the following argument:

> [A]ll property sold at isolated sales within the state has already been the subject of a two percent (2%) tax, either sales or use, upon its first sale at retail, or upon its first use. *Further, the State of Louisiana provides a tax credit where the property in question has already been the subject of a similar tax outside the state*. If appellant had shown that the property in question had been subject to a similar tax, the State would not have claimed further tax. Here there is perfect equality of treatment.

Brief for Appellee at 22, *Halliburton* (emphasis supplied). Louisiana thus argued that it would have allowed the taxpayer to claim a credit for taxes previously paid to *other* states. It was this argument that the Court said it would have "carefully considered" if the argument had enjoyed support in the record. The Court observed however, that the record in *Halliburton* contradicted Louisiana's argument. 373 U.S. at 858 n.8. Similarly, the record in this case reflects the undisputed fact that Arkansas' scheme does *not* allow a credit or exemption against its tax on the sale of used property for taxes imposed by *other* states on previous transactions. Thus, Respondents' attempt to distinguish *Halliburton* based upon its record must fail.

Respondents have also failed to apprehend that Arkansas' tax scheme is designed to eliminate "sequential taxation" only if *Arkansas* imposed a tax on a previous transaction. Arkansas' tax scheme insures that goods moving within Arkansas in intrastate commerce will be taxed only once, thus eliminating "sequential taxation," but exposes goods moving between Arkansas and other states in interstate commerce to such "sequential taxation." Rather than creating equality between local and out-of-state purchases, Arkansas' statutes have the forbidden effect of "favor[ing] local users who wish to dispose of equipment over out-of-state users similarly situated." *Halliburton*, 373 U.S. at 64.

Finally, Respondents' suggestion that Arkansas' selective

effort to avoid "sequential taxation" can pass muster under the Court's "internal consistency" doctrine (Br. Opp. 9) is without merit.[4] Respondents do not deny that if every state adopted Arkansas' taxing scheme and exempted used property from sales or use tax only if it had previously been taxed in the taxing state, then used property that never crossed state lines would be taxed only once whereas used property purchased in one state for use in another would frequently bear a double tax burden. This would appear to be a paradigmatic violation of the "internal consistency" requirement that "'the [tax] must be such that, if applied by every jurisdiction,' there would be no impermissible interference with free trade." *Armco*, 467 U.S. at 644 (quoting *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983)).

Respondents nevertheless argue that so long as "a particular transaction is not taxed more than once,...the tax is internally consistent." Br. Op. 9. Respondents' interpretation of the "internal consistency" requirement flies in the face of its underlying purpose and the Court's cases applying it. A taxing scheme, if applied by every state, can discriminate just as effectively against interstate commerce by favoring related intrastate transactions over similar interstate transactions as by taxing a particular interstate transaction more than once. Indeed, if the Court were to artificially confine the application of the "internal consistency" doctrine to taxes imposed on a single transaction without regard to related transactions involving the same property, it would be wholly foreign to the Court's modern Commerce Clause jurisprudence, which looks to "the practical effect of a challenged tax," *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 443 (1980), and to "economic realities," *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

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[4]Respondents' assertion that the "internal consistency" doctrine relates only to the question of fair apportionment and not to the question of discrimination is false. *See, e.g., Armco*, 467 U.S. at 644 ("internal consistency" rule "applies where the allegation is that a tax on its face discriminates against interstate commerce"); *American Trucking Associations*, 483 U.S. at 284 (applying "internal consistency" test to determine whether facially neutral tax discriminates against interstate commerce).

Moreover, the Court's decisions applying the "internal consistency" doctrine plainly look at related transactions in determining whether a taxing scheme discriminates against interstate commerce. In both *Armco* and *Tyler Pipe*, the Court examined a tax on two separate but related activities -- manufacturing and wholesaling -- in determining whether West Virginia's and Washington's taxing schemes violated the "internal consistency" requirement. The Court observed in those cases that the taxing schemes insured that a single tax burden would be imposed upon these two separate activities only if they were performed in the same state, but would expose such activities to a double tax burden if they were performed in more than one state. *Armco*, 467 U.S at 644;[5] *Tyler Pipe*, 483 U.S. at 246-47.[6] The taxes therefore offended the "internal consistency" requirement. *Armco*, 467 U.S. at 644-45; *Tyler Pipe*, 483 U.S. at 247-48. As we have already noted, precisely the same reasoning applies to invalidate Arkansas' tax scheme which insures that a single tax burden will be imposed if property is purchased new and resold in the same state, but exposes such events to a double tax burden if these events cross state lines.

III. RESPONDENTS' EFFORTS TO BELITTLE THE PRACTICAL SIGNIFICANCE OF THIS CASE LACK SUBSTANCE

Respondents contend that this case lacks national significance

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[5] [W]hen the two taxes are considered together, discrimination against interstate commerce persists. If Ohio or any of the 48 States imposes a like tax on its manufacturers -- which they have every right to do -- then Armco and others from out of State will pay both a manufacturing tax and a wholesale tax while sellers resident in West Virginia will pay only the manufacturing tax.

Armco, 467 U.S. at 644.

[6] The parallel condition precedent for a valid multiple activities exemption eliminating exposure to the burden of multiple tax on manufacturing and wholesaling would provide a credit against Washington tax liability for wholesale taxes paid by local manufacturers to any State, not just Washington. The multiple activities exemption only operates to impose a unified tax eliminating the risk of multiple taxation when the acts of manufacturing and wholesaling are both carried out within the State.

Tyler Pipe, 483 U.S. at 246.

for two reasons. First, they claim that the decision below does not represent a departure from this Court's Commerce Clause doctrine. Br. Opp. 9-11. We have adequately refuted this assertion above and in our petition and need not reiterate it here. Second, Respondents seek to dismiss the relevance of other discriminatory state regimes Petitioners have identified on the ground that they are not identical to Arkansas'. Br. Op. 10-11. In fact, Respondents concede that three of the taxes are "nearly identical to Arkansas'." Br. Opp. 10. Moreover, while there are variations on the precise scope of the discrimination embodied in the other statutes identified by Petitioners, each and every one of them shares the critical feature displayed by Arkansas' tax: they foreclose tax-neutral decisionmaking by favoring in-state over out-of-state economic activity. The continuing threat that these taxing regimes pose to our national economic union compel this Court's intervention to ensure that the free trade purposes underlying the Commerce Clause are faithfully protected.

CONCLUSION

The Court should issue a writ of certiorari to review the judgment of the Arkansas Supreme Court or, in the alternative, to reverse summarily the Arkansas Supreme Court's judgment.

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